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Pondering the Politics of Private Procedures: The Case of ICANN

JAY P. KESAN* & ANDRES A. GALLO**

Abstract: The creation of ICANN was sought by the United States government to promote international cooperation in the governance of the Internet based on a bottom-up system in which government intervention was limited, if not eliminated. However, as the Internet has become a global phenomenon, this initiative has faced increasing opposition from the international community. As we have shown in this article, the evolution of ICANN reveals how it slowly departed from its mere technical role into a more political one, in which all groups and constituencies try to impose their preferences. During the reform movement initiated from inside ICANN, different constituencies tried to exploit the situation by gaining power positions in the new structure. The political strength of different groups and constituencies reversed some of the initial reforms and produced a totally new structure. Reform attempts from inside ICANN were challenged by the international community. These efforts concentrated on changing the main structure of ICANN into a multilateral organization controlled by international governments and removing the direct control of ICANN from the United States government. In the end, even though the proposals seem to look for different structures to regulate domain names and numbers on the Internet, they represent a political struggle between opposite points of view.

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* Professor & Director, Program in Intellectual Property & Technology Law, Mildred Van Voorhis Jones Faculty Scholar, University of Illinois College of Law. I am grateful to the Van Voorhis Jones Estate for their support through the Faculty Scholar Award.

** Associate Professor, Department of Economics and Geography. Coggin College of Business, University of North Florida.

First, the inside-out reform analysis allowed us to examine the political strength of its different constituencies. This process also showed how ICANN has become more of a political instrument, instead of a technical corporation. An indication of this is that most of the debate on the reform was based on how to divide the power inside ICANN, more specifically inside the Board of Directors, and how to maximize the capacity of each group to enforce their policies.

Second, our analysis shows how the inside-out reforms sought to enhance international cooperation. Creating a Supporting Organization for the ccNSO and the incentives for international governments to participate in a better CGA opened the ICANN gates to more extensive international participation in policymaking. However, the international community did not respond adequately to the reform and tried to generate its own model for Internet Governance.

The response of the International community to the regulatory regime of ICANN was the creation of a new organization with international ties and controlled by governments. This proposal, as summarized in the WGIG report, sought to overhaul ICANN and to take away the United States' direct control of ICANN and the management of names and numbers on the Internet. As a result, we face a struggle between two different types of regulation, a bottom-up approach, with more participation from the private sector, and a top-down approach which intends to take Internet governance into the international arena.

As shown in this article, Internet governance has become a hot political issue, and the organizations in charge of managing the regulatory regime will reflect these political preferences. The effectiveness of any of these governance regimes will depend on how well the specific structure of power provides an opportunity for consensus. In the end, the reform and the political struggle behind it have unmasked the political nature of ICANN. As a result, its future will depend on the consensus of its constituents and on the struggle between state and private sectors. In this debate, the United States government is one of the only governments defending ICANN in its current structure because of the contract that ties ICANN directly to the U.S. Department of Commerce. On the other hand, the international community is pushing the U.S. to hand over its sole control of ICANN.

Given the tension between both parties, we believe that this transition could move forward through the creation of a supranational entity in charge, not just of ICANN's responsibilities, but also of other areas related to the Internet, i.e., e-commerce and Internet security. We call this organization the World Internet Governance Organization

("WIGO"), managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the United Nations. WIGO would allow both parties to obtain some of their objectives. The U.S. would retain some power in designing the system, while other developed and developing countries would have more say in the direction of the system. A well-thought proposal that considers the foremost needs of the Internet will have a greater chance of succeeding than individual attempts to overtake the governance of the Internet. Furthermore, it will generate a point of convergence for the diverse preferences of international stakeholders. Nonetheless, the success of such a proposal requires countries to realize that unorganized or individual attempts to regulate will not carry the day.

I. INTRODUCTION

The Internet has been portrayed as a place without government intervention or regulation.[1] In this new environment, Internet users have proudly relied on their own regulating abilities.[2] Businesses maintain that self-regulation has worked for the Internet and that government intervention remains unnecessary. The lack of government intervention was a good signal for some, but bad for others.[3] However, the absence of traditional politics did not mean that governance was not needed.[4] Many private organizations and providers came together to control and regulate the Internet through code, i.e., technical definitions.[5] In this article we explain that ICANN, and more extensively the issue of Internet governance, has become a political issue in which different national governments and constituencies have a stake. Due to the politically-charged context

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[1] *See* Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 447 (2000) (reviewing LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999)).

[2] *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). *See also* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263 (2000) (providing an analysis of this type of regulation).

[3] *See* Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203 (2000) (analyzing the government's attempts to regulate the Internet). Benkler conducted a survey of "all bills introduced in the United States Congress and all public laws passed by Congress and signed by the President, which use the terms 'internet,' 'electronic commerce,' 'e-commerce,' 'world wide web,' or 'interactive' close to 'computer' or 'online.'" *Id.* at 1206. He found that "[t]here were 15 such bills and joint resolutions in the 101st Congress, 23 in the 102d Congress, 34 in the 103d Congress, 66 in the 104th Congress, 275 in the 105th Congress, and 348 introduced in the first session of the 106th Congress, for a total of 761." *Id.* at 1206–07. *See generally* Charles L. Kerr & Oliver Metzger, *Online Privacy: Changing Exceptions—Changing Rules*, 632 PLI/PAT 147 (2001); Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457 (2001); Bill Luther, *A Commentary on the State of Online Privacy and the Efficacy of Self-Regulation*, 27 WM. MITCHELL L. REV. 2125 (2001); Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215 (2000).

[4] *See* Jay P. Kesan & Andres A. Gallo, *Optimizing Regulation of Electronic Commerce*, 72 U. CIN. L. REV. 1497 (2004).

[5] *See* Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace*, 5 COMMLAW CONSPECTUS 181 (1997). *See also* LESSIG, *supra* note 2.

surrounding Internet governance it becomes necessary to look for a system that reflects the preferences of stake holders instead of one that purely promotes the best technical design.

In 1998, a new corporation was created to manage the addresses and numbers of the Internet: the Internet Corporation for Assigned Names and Numbers ("ICANN").[6] This non-profit organization was designed to manage the system from a technical point of view, without government intervention or political influence.[7] In accord with the intentions of its creators, particularly the United States government, ICANN represented the paradigm of bottom-up regulation, in which the private sector could design its own rules without the interference of politicians.[8] However, after only three years, the rapid internationalization of the Internet led to proposals for changing ICANN's governance structure. As we show in this article, ICANN was involved in a political process since its creation, despite assertions to the contrary.

In 2002, the President of ICANN introduced a reform proposal arguing that ICANN could not perform its regulatory role without cooperation from the United States and other national governments.[9] Throughout 2002 and 2003, the different stakeholders in ICANN debated the type and extent of this reform.[10] However, many of ICANN's constituencies have tried to avoid involving national governments, in direct opposition to the President's proposal. [11] As we demonstrate in this article, the reform process, and its result, revealed the political nature of ICANN as opposed to the intended technical nature of the organization. However, ICANN was not widely accepted. International actors, more importantly the United Nations through its

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[6] *See* MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002). *See also* MILTON MUELLER, CONVERGENCE CENTER, SUCCESS BY DEFAULT: A NEW PROFILE OF DOMAIN NAME TRADEMARK DISPUTES UNDER ICANN'S UDRP (2002).

[7] Management of Internet Names and Numbers, 63 Fed. Reg. 31741-01 (Jun. 10, 1998), *available at* http://www.icann.org/general/white-paper-05jun98.htm.

[8] *Id.*

[9] *See* M. STUART LYNN, PRESIDENT'S REPORT: ICANN–THE CASE FOR REFORM (2002), http://www.icann.org/general/lynn-reform-proposal-24feb02.htm.

[10] *See generally* ICANN, Links Concerning ICANN's 2002 Evolution and Reform Process, http://www.icann.org/committees/evol-reform/links.htm (last visited April 5, 2008).

[11] *See infra* Sections III to V.

International Telecommunications Union ("ITU"), rejected the organization of ICANN. As ICANN underwent this reform process, the United Nations tried to create a different model of Internet governance, shifting control away from the United States in favor of the UN and restructuring ICANN as a multilateral organization via outside-in reform. As a result, we are in the midst of a political struggle targeting ICANN to define the governance regime for the Internet.[12]

In this article, we analyze how the interests of economic groups, countries, and users gave rise to the different governance proposals by employing the framework of political economy; this perspective allows us to model different actors' preferences and reflect how these preferences play a role in creating and modifying governance institutions. In this framework, each group holds a certain set of preferences for ICANN governance that favors its own interests. These interests may conflict with the most efficient management of ICANN. Allowing one nation to manage ICANN exacerbates this problem in the eyes of the international community. Rather than seeing ICANN as organized to ensure its efficacy, we shall see that it is in fact structured according to the interests of the most powerful groups within ICANN.

To do this, we use a simple preferences model to understand where each group stands, and we analyze how the success or failure of reform is based on such preferences. The issue of Internet governance has become a political issue in which constituencies' strength and preferences will shape the kind of institution in charge of managing the Internet domain names. The conflicted visions regarding the preferred structure of ICANN have led to a policy stalemate between the United States, the United Nations and the other international organizations that could potentially take control of ICANN. As we propose, a possible solution to this problem is the creation of an organization, similar to the WTO, which we call WIGO. This organization should retain the technical ability of ICANN to control the names and addresses of Internet, but allow for further participation from the international community.

In Section II, we present background regarding ICANN and the Uniform Domain Resolution Policy ("UDRP"). In Section III, we describe the initial characteristics of ICANN's structure at its inception in 1998. In Section IV, we present a model of the preferences of the groups holding a stake in Internet regulation. In

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[12] Tamar Frankel, *Governing by Negotiation: The Internet Naming System*, 12 CARDOZO J. INT'L & COMP. L. 449, 452 (2004).

Section V, we present the reform proposal presented by ICANN's President and analyze the effects it would have had on the constituencies' distribution of political power. In Section VI, we analyze the attempts of the international community to take over ICANN from the United States and replace it with an international organization. Finally, we present our conclusions in Section VII. Among them, we demonstrate that even though many observers criticized the ICAAN reform from a normative point of view, this reform was the one that was politically feasible. Given the political persuasion of those groups that maintained or increased their power, the reform is far from an efficient one. ICANN was not instituted based on an objective measure of efficiency, but rather to maintain the power of stakeholders already in place. Furthermore, we show how far ICANN is from being a representative organization in the management of the Internet by detailing the outcry of the international community, the extreme reforms proposed by the Working Group on Internet Governance ("WGIG"), and the heated debate during the last World Summit on the Information Society ("WSIS"). Finally, we propose a mixed institution that retains some of the technical aspects of ICANN but gains legitimacy across constituencies in Section VII.

II. ICANN IN THE LITERATURE

ICANN has been the focus of numerous studies. Its creation signaled a style of regulation unique to the Internet environment. As Jonathan Zittrain explains:

> ICANN has inherited an extraordinarily difficult situation, with high expectations all around, and with almost no discretionary room to move. The set of realistic options for substantive policy making and procedural structure is quite small. For better or worse, ICANN faces swift dispatch if it strays too far from the desires of any of the mainstream Internet technical community, the United States and other governments (including executive, legislative, and judicial branches, which in turn may not agree) and powerful corporate interests. Indeed, those representing the "little guy" and/or those wanting a maximally unregulated Net—one where political concerns have no place in technical

> management—are quick to worry about capture of ICANN by one or another of these powerful interests.[13]

The special characteristics of ICANN, combined with the existence of many different stakeholders, generated an intense debate on issues of Internet regulation. Critics argued for and supporters of the new system argued against the reform of ICANN. This debate involved all of the areas managed by ICANN. Among them, the Uniform Domain Resolution Policy ("UDRP") occupied a central role because it became ICANN's preferred instrument to enforce domain name contracts with Internet users. As a result of this policy, ICANN became both the de-facto and the de-jure regulator of Internet domain names and numbers, according to its contract with the Department of Commerce. This Section discusses the usual approaches to studying ICANN and explains how this article provides a new and useful analysis of its development.

A. ICANN LEGITIMACY

One of the main debates regarding the formation of ICANN was the question of whether the Department of Commerce had the authority to delegate Internet governance to a private, nonprofit organization. First, some researchers argued that the United States government, which found itself in control of the Domain Name System ("DNS") and its regulation,[14] could not delegate the management of the DNS to a private institution without Congressional approval[15] As Michael Froomkin argued, delegating a government regulatory function to a private organization could be considered unconstitutional.[16] Froomkin stated that giving regulatory power to a non-profit organization meant relinquishing government sovereignty and delegating the federal government's Constitutional powers to a non-governmental entity.[17] Furthermore, as Froomkin

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[13] Jonathan Zittrain, *ICANN: Between the Public and the Private Comments before Congress*, 14 BERKELEY TECH. L.J. 1071, 1091 (1999).

[14] Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE L.J. 17, 21–22 (2000).

[15] *See id.*

[16] *Id.* at 28.

[17] *See id.*

observed, granting regulatory power to a private institution that has a stake in the issue to be regulated can create arbitrariness, lack of due process, and self-dealing; all of which also raise constitutional concerns.[18] As a solution to these conflicts of interest, Froomkin proposed a new system in which ICANN would be limited to handling technical functions, while the United States government would retain political control over the DNS.[19] To avoid international complaints, the United States government would share political control with a small group of foreign representatives and Internet constituents.[20] Nonetheless, Froomkin's advice remained unheeded.

The debate regarding the constitutionality of ICANN continued, and support for the Department of Commerce decision quickly appeared. Kathleen Fuller argued that even though Froomkin's arguments were convincing, they could be circumvented. Therefore, the contract with ICANN could remain in place.[21] Furthermore, Jose Sims and Cynthia Bauerly discredited Froomkin's claims on the basis of faulty legal interpretation and insufficient knowledge of the origins of the Internet and the DNS.[22] This debate continued with Froomkin and Mark Lemley arguing that ICANN and its policies, which monopolize the DNS, violate United States antitrust law.[23] Nevertheless, Lily Blue argued, there is little room to charge ICANN with antitrust violations, as ICANN policies do not create a monopoly and are necessary to sustain the Internet.[24] In this respect, several authors supported ICANN as necessary to provide important standards and regulations for the Internet.[25]

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[18] *Id.* at 146.

[19] *Id.* at 171.

[20] *Id.* at 14 at 178–79.

[21] Kathleen Fuller, *ICANN: The Debate Over Governing the Internet*, 2001 DUKE L. & TECH. REV. 0002 (2001).

[22] Joe Sims & Cynthia Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate the APA or the Constitution*, 6 J. SMALL & EMERGING BUS. L. 65, 68–70 (2002).

[23] Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 74–75 (2003).

[24] Lily Blue, *Internet and Domain Name Governance: Antitrust Litigation*, 19 BERKELEY TECH. L.J. 387, 403 (2004).

[25] Jose MA. Emmanuel A. Caral, *Lessons from ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 INT'L J.L. & INFO. TECH 1, 30–31 (2004).

A second issue that has come under scrutiny is the manner in which ICANN decides its regulations and norms. That is, what are the bases for legitimacy and consensus within ICANN?[26] This issue is closely related to the way in which the United States government delegated regulatory function to ICANN. Jonathan Weinberg argues that ICANN has tried to pursue legitimacy under the same principles as other federal government agencies: representation and consensus.[27] However, Weinberg maintains that ICANN cannot obtain legitimacy and form consensus under any of these bases.[28] As a result, ICANN should narrow the scope of its policies to minimize its intervention in an environment that does not welcome it.[29] Furthermore, many critics complain that ICANN's decisions are far from democratic because democratic institutions, such as Congress, international organizations, foreign national governments, or Internet users, have no role in ICANN governance.[30] As a result, under this view, consumers and citizens have no say in the specific design of Internet regulation. Nonetheless, Dan Hunter argues that the legitimacy problem lies not in the nature of ICANN, but in our understanding of democracy.[31] He maintains that ICANN critics put too much emphasis on an ideal definition of democracy, which is not representative of the reality we face on the Internet.[32] Even so, ICANN should try to pursue political commitments among different Internet stakeholders in order to improve its performance.[33]

The debate on legitimacy, democracy, representation, and consensus continues within ICANN and has led to the reform process we analyze in this article. On one hand, John Palfrey claims that ICANN failed to bring democracy to the Internet and that it should be

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[26] Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 212–13 (2000).

[27] *Id.* at 258–59.

[28] *Id.*

[29] *Id.* at 260.

[30] *Id.*; Froomkin, *supra* note 14, at page 167.

[31] *See* Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (2003).

[32] *Id.* at 1153.

[33] *Id.* at 1181.

reformed accordingly.[34] On the other, Susan Crawford argues that democratic online representation is impossible.[35] As a result, we can justify the reliance of ICANN on a consensus model.[36] However, Crawford decries the reform efforts of 2002 because they failed to bring about constructive reform.[37] David Johnson, David Post, and Crawford agree that the ICANN reform led to a more centralized, top-down, regime for Internet regulation.[38]

Due to globalization of the Internet, advocates of the democratic and consensus approach support opening ICANN to other national national governments, especially through the United Nations.[39] According to this view, the United States government should relinquish its control of ICANN to the United Nations, which should then create a new international organization to regulate the Internet.[40] In fact, several proposals have been suggested; in the policy arena, the International Telecommunications Union ("ITU"), which sought for itself a role as the natural forum for Internet policy, became the main supporter of this international approach and has confronted ICANN since its inception with competing proposals for Internet governance.[41] The most recent proposals came from the World Summit on the Information Society ("WSIS") and the Working Group on Internet Governance ("WGIG").[42] Despite these international

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[34] John Palfrey, *The End of the Experiment: How ICANN's Foray Into Global Democracy Failed*, 17 HARV. J. L. & TECH. 409, 411–12 (2004).

[35] Susan P. Crawford, *The ICANN Experiment*, 12 CARDOZO J. INT'L & COMP. L. 409, 447 (2004).

[36] *Id.* at 446.

[37] *See* Sims & Baverly, *supra* note 22, at 65.

[38] David R. Johnson, David Post & Susan P. Crawford, *A Commentary on the ICANN "Blueprint" for Evolution and Reform*, 36 LOY. L.A. L. REV. 1127, 1127–28 (2003). *See* Michael Froomkin, *ICANN 2.0: Meet the New Boss*, 36 LOY. L.A. L. REV. 1087 (analyzing a series of studies that show how ICANN reform reduced the participation of Internet users and constituencies).

[39] Reece Roman, *What if ICANN Can't?: Can the United Nations Really Save the Internet?*, 2006 SYRACUSE SCI. & TECH. L. REP. 6, 7 (2006).

[40] *Id.*

[41] *See* Kim G. von Arx, *ICANN—Now and Then: ICANN's Reform and its Problems*, 2003 DUKE L. & TECH. REV. 0007 (2003).

[42] *See* Working Group on Internet Governance, http://www.wgig.org.

efforts, as we will analyze below, ICANN continues to maintain control of names and numbers. Nevertheless, the heated debate concerning the legitimacy and structure of ICANN and the role of the United States continues.

B. ICANN UDRP: ATTEMPTING GLOBAL REGULATION

The Uniform Domain Resolution Policy is one of the main policies ICANN implemented to regulate complaints among domain name owners and, as such, it has been subject to deep scrutiny.[43] This dispute resolution system for domain name owners is the first ambitious attempt to generate a regulatory system for the Internet. Many studies have focused on the performance of this regime, trying to ascertain whether the system provides adequate redress for Internet users and businesses around the world. Many of the findings of these studies have undermined the legitimacy of the UDRP and have cast suspicion on the ability of ICANN to produce effective and unbiased regulations.[44] John White argues that the UDRP is a good way to combat cybersquatting, but warns that it should be flexible in order to consider specific situations.[45]

Only one year after its implementation, Robert Badgley suggested that the poor quality of decisions was linked to problems in the UDRP design and not to bad arbitrators.[46] Badgley proposed a series of reforms needed to improve UDRP's efficiency.[47] After these initial reactions, which proposed reforms to improve UDRP performance, different studies became more critical of the regulatory regime. For instance, David Sorkin argued that United States courts should not rely on the decisions reached by the UDRP system, given the problems

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[43] Froomkin, *supra* note 14, at 25.

[44] Luke Walker, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L. J. 289, 303–304 (2000).

[45] John White, *ICANN's Uniform Domain Name Dispute Resolution Policy in Action*, 16 BERKELEY TECH. L. J. 229 (2001); Gillian Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 J. SMALL & EMERGING BUS. L. 257 (2002).

[46] Robert Badgley, *Improving ICANN in Ten Easy Steps: Ten Suggestions for ICANN to Improve its Anti-Cybersquatting Arbitration System*, 2001 U. ILL. J.L. TECH. & POL'Y 109 (2001).

[47] *See id.*

with its procedure.[48] Conversely, Katherine Meyers argued that the courts should give UDRP the same treatment they give federal agencies.[49] Froomkin offered a more dire diagnosis, as he criticized ICANN for privatizing and internationalizing trademark law and creating an artificial, centralized system for managing DNS, which eliminated the ability of other possible instruments for conflict resolution regulation.[50] In the same fashion as the other researchers, Froomkin also offered a list of possible solutions for the UDRP.[51] Elizabeth Thornburg, likewise, criticized the UDRP for offering a limited arbitration policy that lacks the basic characteristics necessary for an adequate regime.[52] Notably, Michael Geist provided the first statistical analysis of ICANN's arbitration system and found differences in decisions when the panel is composed of three arbitrators, and a bias within UDRP caseload allocation, which provides a strong incentive for forum shopping.[53] We also provided further empirical evidence on the problems of forum shopping by complainants and performance differences across UDRP providers.[54] As a consequence, the questions regarding the legitimacy of ICANN have been transferred to the UDRP, and the criticism has grown because of technical problems in the arbitration process.

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[48] David Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH L. J. 35, 46–47 (2001). *See* Nilanjana Chatterjee, *Arbitration Proceedings Under ICANN's Uniform Domain Name Dispute Resolution Policy–Myth or Reality?*, 10 VINDOBONA J. OF INT'L COM. L. & ARB. 67 (2006). *See also* Richard E. Speidel, *ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. SMALL & EMERGING BUS. L. 167 (2002).

[49] Katherine Meyers, *Domain Name Dispute Resolution in U.S. Courts: Should ICANN be Given Deference?*, 43 B.C. L. REV. 1177, 1199 (2002).

[50] Michael Froomkin, *ICANN's Uniform Dispute Resolution Policy—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 612 (2002).

[51] *See id.*

[52] Elizabeth Thornburg, *Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002).

[53] Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 936 (2002).

[54] Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services–An Empirical Re-assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. L. REV. 285, 368–69 (2005).

Despite these debates on the legitimacy and performance of ICANN, no one has analyzed the political evolution of ICANN as an endogenous process of change. Different studies analyzed ICANN and its alternatives as static, feasible versions for Internet regulation. These normative proposals have been based on ideal models of optimal regulatory regimes, without taking into account the limits and opportunities offered by the ICANN experience. These different visions regarding regulation confront three different Internet constituencies: Internet users—early developers and Internet libertarians—who oppose proprietary interests and government intervention; defenders of the United States' role as the sole source of regulatory power; and those who favor a multi-country, decentralized approach based on the United Nations model for Internet governance. In addition, these debates on regulatory structure fail to explain how these differing positions have created a dynamic process of political change. ICANN, despite its dependence on the United States government, is not isolated from the political pressure of other countries or other Internet constituencies.

This article shows how this debate has led to changes in the internal political structure of ICANN as well as induced external attempts to create an organization that would provide a more diverse model for Internet regulation. As a result, this article provides an analytical framework to understand changes in ICANN, and the possible future evolutions of its political structure. To understand this process, it is imperative to explain how Internet regulation will change over time, and the challenges and opportunities inherent in creating a global regulatory framework.

III. POLITICAL EVOLUTION AND STRUCTURE OF ICANN

Since its inception, ICANN has experienced a number of structural changes.[55] Most of the changes that took place between 2002 and ICANN's creation in 1998 were intended to provide a governance structure inside ICANN, which allowed the participation of different groups and constituencies in the policymaking process.[56]

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[55] *See* ICANN, Bylaws Archive, http://www.icann.org/general/archive-bylaws/ (last visited April 5, 2008) (providing a complete evolution of the bylaws that regulated the policymaking process of ICANN). *See also* Frankel, *supra* note 12, at 457.

[56] *See* Frankel, *supra* note 12, at 457.

At its inception, ICANN had an Initial Board in charge of management and policymaking.[57] The Board was composed of nine members from the at-large constituency of ICANN with the authority to manage and develop its main structure.[58]

In its first bylaws, enacted by the Initial Board, the ICANN structure included a Board of Directors in charge of all decisions and three supporting organizations, containing the main constituencies with a focus on the activities of ICANN (Figure 1).[59] According to the bylaws, the ICANN Board consisted of nineteen directors elected by the supporting organizations (three each) and by the at-large members (nine) of ICANN.[60] This structure also provided for three advisory committees[61] to help the Board in the policymaking process.[62] The initial bylaws did not define a specific composition for

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[57] *See* Management of Internet Names and Numbers, *supra* note 7.

[58] *See* ICANN, Bylaws, Nov. 6 1998, Art. IV, § 1(a), http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm.

[59] *See id.*

[60] *See id.*, Art. V, §§ 3, 4.

[61] *See id.*, Art. VII, § 3. The three Advisory Committees were: the Government Advisory Committee ("GAC"), composed by international governments, multinational governmental organizations and treaty organizations; the DNS Root Server System Advisory Committee ("RSSAC"), composed by the organizations responsible for the operation of the world's thirteen root name servers and other organizations related to the root server system; and the Advisory Committee on Membership ("ACM") with members appointed by the Board (temporary committee).

[62] According to the bylaws, the role of each Committee was:

The GAC:

> should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements. The Board will notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) and will consider any response to that notification prior to taking action.

Id., Art. VII, § 3(a).

The RSSAC:

the different supporting organizations, but rather left this task open to future reviews by the Board of Directors upon consultation with specific groups and constituencies.[63] As a consequence, even though the structure of ICANN was subject to further reform, the power inside ICANN was divided among private constituencies—the members of each supporting organization—with an interest in developing the Internet.

Having endured many changes in its first two years, the governing structure of ICANN was almost complete by the beginning of 2000 (Figure 2). Nonetheless, ICANN's performance during 2001 left many people wondering if this particular structure was working properly.[64] Since then, many reforms have been proposed, and a global debate has arisen regarding how ICANN should be structured and what regulatory power it should have. In the next Section, we analyze the different proposals and how the preferences of different actors have a role in shaping the direction of the reforms.

> The responsibility of the Root Server System Advisory Committee shall be to advise the Board about the operation of the root name servers of the domain name system. The Root Server System Advisory Committee should consider and provide advice on the operational requirements of root name servers, including host hardware capacities, operating systems and name server software versions, network connectivity and physical environment. The Root Server System Advisory Committee should examine and advise on the security aspects of the root name server system. Further, the Root Server System Advisory Committee should review the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.

Id. Art. VII, § 3(b).

> The ACM: "The responsibility of the Advisory Committee on Membership shall be to advise the Board on the creation of the membership structure called for in Section 9(c) of Article V [At-Large members]."

Id. Art. VII, § 3(c).

[63] *See id.* Art. VI: Supporting Organizations.

[64] The source of such concerns is evident in light of the reform proposal submitted by ICANN's President.

Figure 1. Initial Structure of ICANN

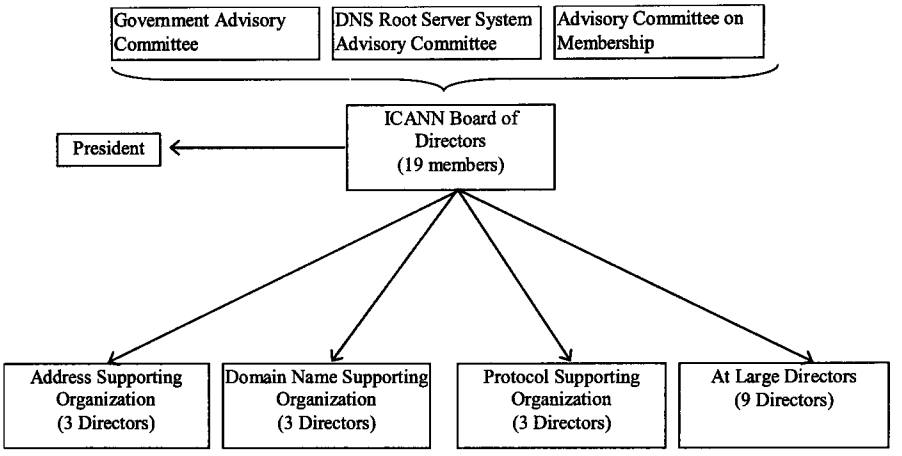
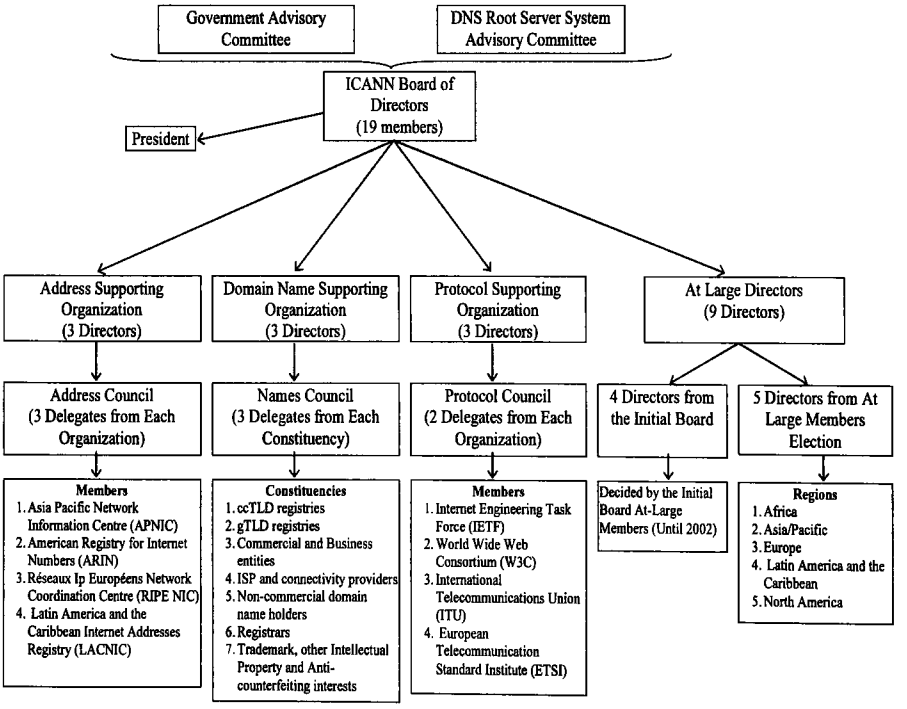


Figure 2. ICANN Structure Year 2001



IV. MODELING PREFERENCES

In order to analyze the various proposed reforms to ICANN and the reaction of the many constituencies represented (and even those not represented) in ICANN's Board, we present a model that spatially represents preferences. This model helps to demonstrate the stake economic groups and countries have in ICANN, and the political nature of this process. Since the creation of ICANN, the private sector has had the advantage of defining regulation according to its economic interests in the Internet. Nonetheless, the growing influence of Internet users as well as other countries has led them to challenge the private control of ICANN.[65]

As the Internet grows, more actors will appear and will try to influence the decision-making process of ICANN. We assume that there are two main dimensions that define the main characteristics of a governance institution such as ICANN. On one hand, since the creation of ICANN, the debate has been whether this organization should be controlled by the private sector or the government. For example, the U.S. government attempted to give more control to the private sector while the ITU proposed an organization more directly controlled by state governments. Yet, since the early times of the Internet, users have proposed a system of direct participation, instead of an organization that responds directly to private interests or national governments. An example of this is the fact that the initial structure of ICANN allowed the selection of some Directors through direct elections by Internet users. As a result, we assume that most of the differences in preferences among the groups concern these two issues: the level of government involvement in ICANN and the means of representation (i.e., direct votes or delegates).

The system for governing the Internet can be based on a bottom-up or a top-down approach. Since its inception, decision-making in ICANN has followed a bottom-up approach, and this method was defended by most of the constituencies represented on the Board of Directors. The top-down approach to decision-making has not been fully applied to the Internet, because national governments (with the exception of the United States) do not have much input regarding ICANN regulations. On the other hand, Internet users proposed a more decentralized bottom-up system, in which the Board of Directors

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[65] *See infra* Section VI.

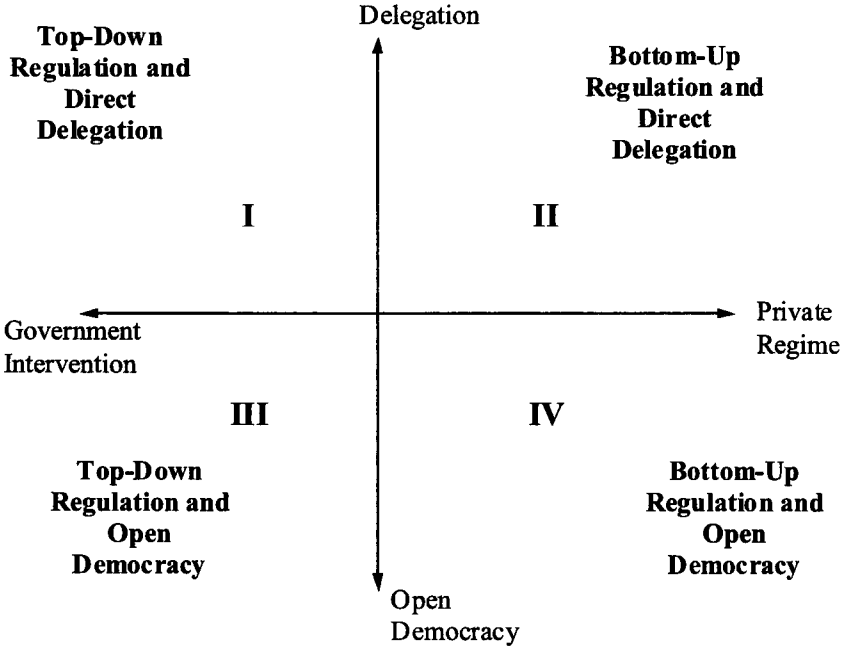
would be elected by direct vote from net-citizens.[66] In this scenario, users would govern the Internet, without significant intervention by national governments or the private sector. Accordingly, this dimension of state versus private sector control constitutes the first line of disagreement about the reforms.

The second area of disagreement involves the type of representation ICANN should have. On one hand, private sector representatives prefer a system of direct delegation from private firms that design and manage the structure of the Internet through ICANN. National governments who want to name delegates to ICANN's Board also prefer this type of organization. On the other hand, Internet users would like to participate more directly in the decision-making process to institute friendlier policies for consumers and users.

As a result, the spectrum of debate for the upcoming changes in ICANN structure mirrored these two dimensions (Figure 3). As we can see, combining these two issues results in four different policy spaces concerning regulation and delegation. In the first policy space (I), we have a system in which the government creates the rules for regulation, and the composition of the Board of ICANN is dictated by direct representation from governments and other constituencies. This system has a strong top-down regime, in which governments would be influential, while the private sector and Internet users will have a low participation.

[66] See the following interview to Carl Auerbach, one of the elected ICANN board members and vocal activist for a decentralized governance for ICANN, at http://www.oreillynet.com/pub/a/policy/2002/12/05/karl.html.

Figure 3. Policy Spaces



Under the second policy space of structure for ICANN (II), the private sector dictates who will be in charge of defining and managing the rules. ICANN representation would be chosen by direct delegation from the constituencies. Such a system would reinforce the control of proprietary interests in the policymaking process of ICANN. In this case, governments and Internet users are excluded from the decision-making process. In the third space (III), a system emerges in which the government still defines the rules for regulating the Internet, but representation is subject to a more democratic process. This would allow users greater participation in the decision-making process, even though their representatives would be operating under a regime defined by government. Finally, in the fourth space (IV), a system appears in which open democracy is applied to a bottom-up regulatory regime. This type of regime would give more control to users and their advocates. However, under this regime, neither national governments nor the proprietary private sector would have enough power to directly participate in the policymaking process, which would make this system highly unstable.

Given the potential room for debate regarding the new structure of ICANN, it is important to identify (1) the current ICANN structure, (2) the proposed changes, and (3) the preferences of its constituencies.

We analyzed (1) in Section III of this article, so we now turn to (2) the proposed changes. By analyzing the preferences of each group, we can determine the chances of success for the different reforms as well as which groups will support a given reform. We consider two main proposals for reform. First, there is the inside-out process of reform, initiated by ICANN's President in 2002.[67] Even though this process looked like a simple consensual process to modify ICANN, it was an attempt by ICANN's President to include more international constituencies and, at the same time, maintain the private sector's involvement on the Board. Second, the United Nations and the International Telecommunications Union ("ITU") headed an outside-in reform attempt in 2003 through the World Summit on the Information Society. The reform can be understood as an attempt to strip ICANN and the United States government of their monopoly of domain names and numbers regulation and transfer it to an international organization under the direct control of the United Nations or the ITU. In the following Sections, we analyze these proposed reforms in terms of our preferences model. We show how the debate about Internet regulation is far from over and how it has become more complex and political.

V. INSIDE-OUT REFORM: ICANN'S PRESIDENT PROPOSAL

In February 2002, the President of ICANN proposed a set of changes to the structure of ICANN, particularly with respect to how the Board is composed and how the Directors are elected.[68] The President mentioned many factors that instigated the need for change:

> ICANN is still not fully organized, and it is certainly not yet capable of shouldering the entire responsibility of global DNS management and coordination. ICANN has also not shown that it can be effective, nimble, and quick to react to problems. ICANN is overburdened with process, and at the same time underfunded and understaffed. For these and other more fundamental reasons, ICANN in its current form has not become the effective steward of the global Internet's naming and address allocation systems as conceived by its founders. Perhaps even more importantly, the passage of

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[67] *See* LYNN, *supra* note 9; *infra* Section V.

[68] LYNN, *supra* note 9.

> time has not increased the confidence that it can meet its original expectations and hopes.[69]

This short paragraph summarizes the main problems ICANN faced just two years after its foundation. Throughout ICANN, it was well known that reform was needed. As for the direction of the changes, the President stated the following:

> I have come to the conclusion that the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical. The fact that many of those critical to global coordination are still not willing to participate fully and effectively in the ICANN process is strong evidence of this fact. But I also am convinced that, for a resource as changeable and dynamic as the Internet, a traditional government approach as an alternative to ICANN remains a bad idea. The Internet needs effective, lightweight, and sensible global coordination in a few limited areas, allowing ample room for the innovation and change that makes this unique resource so useful and valuable.[70]

In this paragraph the President blames most of the failures of ICANN to the pure bottom-up approach of its structure. As a result, he advocates for a more active role for government, even when he is reluctant to endorse a purely top-down approach. This proposal seems to recognize a need to move toward a mixed system with cooperation among national governments and the private sector.[71] Having advocated active participation from both public and private entities, the President presented the newly proposed structure of ICANN for debate.

The President's proposal was an ambitious plan to open ICANN governance to other important Internet constituencies. In particular, it offered an important role to foreign governments and relegated some of the previous supporting organizations to an advisory position. According to the President's proposal, the Board of Directors would be transformed into a Board of Trustees with (1) fifteen members (rather

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[69] *Id.*

[70] *Id.*

[71] *Id.*

than nineteen),[72] (2) five nominated by national governments (one from each geographic area),[73] (3) five nominated by the Nominating Committee and confirmed by the remaining Board of Trustees,[74] and (4) five ex-officio trustees appointed by the President, the chairs of the

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[72] *Id.*

[73] *Id.* ("a. Five (one from each ICANN geographic region) nominated by national governments (process to be determined) and confirmed by the Board of Trustees.").

[74] *Id.* b. Five nominated by open nominating process and confirmed by the Board of Trustees:

1. Nominating Committee made up of: (a) nonvoting Chair, appointed by ICANN CEO after wide consultation; (b) three Trustees whose terms are not expiring; and (c) four other persons selected by the Board of Trustees, after wide consultation.

2. Nominations process open to all suggestions and inputs, widely publicized, with adequate time to do thorough work. The Nominating Committee is expected to consult with a broad range of the ICANN communities for input to its deliberations.

3. To assure open communications and substantive input from all major stakeholders, there will be at least the following nonvoting liaisons to the Nominating Committee: designees or representatives of IAB, IP address registries, domain name registries and registrars, root name server operators, and the immediately preceding chair of the Nominating Committee.

4. Nominating Committee makes nominations based on well-defined criteria, clearly stated in advance for each position: outstanding professional accomplishment, technical understanding, record of leadership, reputation for good judgment, record of public service, independence and willingness to commit time and effort; all with due regard for geographic diversity and differentiated experience objectives.

5. When making nominations to a particular Council, the Nominating Committee will consult widely with the most affected stakeholder communities. For example, in making nominations for the Address and Numbering Steering Group, the Nominating Committee will consult with the IAB, RIR Boards and staff, and ISPs.

policy councils, and the Technical Advisory Committee chair.[75] The supporting organizations are eliminated and replaced by three policy councils.[76] These councils are the (1) Address and Numbering Policy Council,[77] (2) Generic TLD Names Policy Council,[78] and (3) Geographic TLD Names Policy Council.[79] The new proposal considers creating four new committees. The first two, the Government and Technical Standing Advisory Committees,[80] would advise the Board on policy decisions. The second two, the Root Name Server Operations Committee and the Security Committee, were more technical in nature. Finally, an ombudsman was proposed to oversee public comments and ensure the general transparency of the operations (Figure 4).[81] This proposal offered a simpler and more manageable structure than the existing structure which is depicted in Figure 2. The number of directors, now named trustees, would

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[75] *Id.*

[76] *Id.*

[77] *Id.* ("The [Address and Numbering Policy Council] would essentially combine the functions of the current PSO and ASO into a single body, with appropriate staff support and a single Steering Group. The ANPC would have responsibility for advising the Board on the very limited range of policy issues relating to IP address allocation, and any policy or operational issues that arise in connection with ICANN's performance of the IANA protocol numbering functions.").

[78] *Id.* ("The GNPC would replace the current DNSO, again with appropriate staff and with a Steering Group partly representing stakeholder groups and partially selected by the Board of Trustees.").

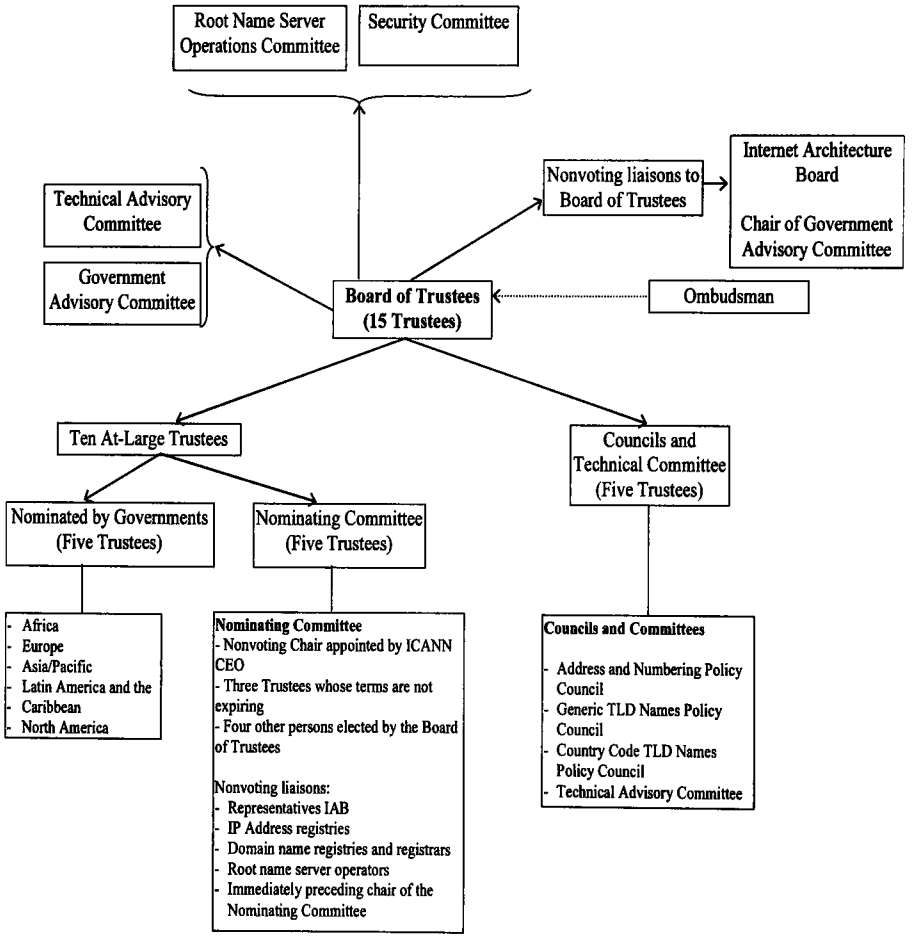
[79] *Id.* ("The ccNPC would be a new entity, intended to provide both policy advice to the Board of Trustees where needed and to serve as a service and policy advisory body to the 243 ccTLDs. It would have appropriate staff support, and a Steering Group made up of both ccTLD representatives and other persons with relevant knowledge or experience that could contribute to these objectives.").

[80] LYNN, *supra* note 9. The GAC should continue to be a forum for national governments to discuss DNS policy issues, but should have appropriate staff support, and full membership should require a funding contribution per some tiered schedule (requiring little or no contribution from less developed nations). The GAC Chair would serve as an *ex officio* liaison to the ICANN Board of Trustees .... The TAC will advise the ICANN Board and staff on the technical aspects of ICANN's operational responsibilities. For example, the TAC would be the body to provide advice on testing the use of shared addresses for the root name servers, or for testing the ability to deploy internationalized TLDs in the root zone file.

[81] *Id.*

decrease from nineteen to fifteen.[82] Furthermore, direct elections by the at-large members would be eliminated and replaced with election by national governments.[83]

Figure 4. Proposed Change to ICANN Structure



[82] *Id.*

[83] *Id.*

The proposed centralized structure increases Board power and, therefore, makes Board representation crucial for the actors within ICANN. The Councils created to replace the existing supporting organizations would elect just one trustee each, instead of the current three per supporting organization.[84] Finally, the final five trustees would be elected by the newly-created Nominating Committee, composed of a nonvoting Chair appointed by the ICANN CEO, three trustees whose terms do not expire, and four other members elected by the Board of trustees. As a result, the Board of Trustees would have strong control over the Nominating Committee.[85]

The seats on the Board were divided among national governments, different private sectors (through the councils), and independent trustees who would be elected by the Nominating Committee. National governments and technical organizations would also have an important role in advising the Board through two new advisory committees and the two nonvoting liaisons in the Board.[86] As a consequence, this proposed structure of ICANN fosters stronger involvement from both national governments and the private sector, and less participation from independent Internet users who compose the at-large membership. If one envisioned democratic representation within ICANN that would allow users to vote and directly participate, then this proposal took the opposite direction.

This proposal was widely discussed and criticized. In the end, the bylaws approved were quite different from those envisioned by the President's initiative. As we discuss in the next Section, the current stakeholders in ICANN, who held a veto power over the proposed changes, took the reform process in a different direction, one that accorded better with their preferences.

A. CONSTITUENCIES' PREFERENCES SHAPE INSTITUTIONAL REFORM

Following our preferences model developed in Section III (Figure 3), Figure 5 shows the preference points for each group in the current structure of ICANN. Each point in Figure 5 represents the system that each constituency prefers for ICANN. The point labeled "ICANN" represents the structure of ICANN before the proposal of 2002, i.e., a private corporation relatively free from government intervention with

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[84] LYNN, *supra* note 9.

[85] *Id.*

[86] *Id.*

a quasi-direct system of delegation. The point labeled "President Proposal" represents the preference point for the President, according to the proposal he presented in early 2002. As indicated, this proposal was intended to restructure ICANN, to allow more participation from national governments and to reduce the direct involvement of the private sector. However, the proposal did not try to create an alternative democratic system for ICANN. The preferences of the private constituencies of ICANN, particularly the Address Supporting Organization ("ASO") and the Country Code Top Level Domains ("ccTLDs"), are represented by a set of points labeled with their names. These constituencies would prefer a system in which ICANN policymaking is based on a bottom-up regime, with little direct participation from users, i.e., a system controlled by the private sector. As a consequence, they would strongly oppose the reform proposed by the President. Finally, Internet users would prefer a relatively decentralized system with little government intervention but not completely controlled by proprietary interests. At the same time, users would like to have open, democratic access to the ICANN governing body.

To further elucidate each party's preference, given the current make-up of ICANN, Figure 6 illustrates the politics of ICANN reform. The point of intersection is labeled "ICANN" and is considered the status quo, because it represents the current structure of ICANN under debate. As in Figure 5, each point represents the preferred regime for each constituency. The farther the status quo is from the preference point of a given constituency, the lower the level of utility that group receives from the current organization. Finally, the circle for each constituency or group represents the preferred set of options in the political space.

Figure 5. Preferences for ICANN

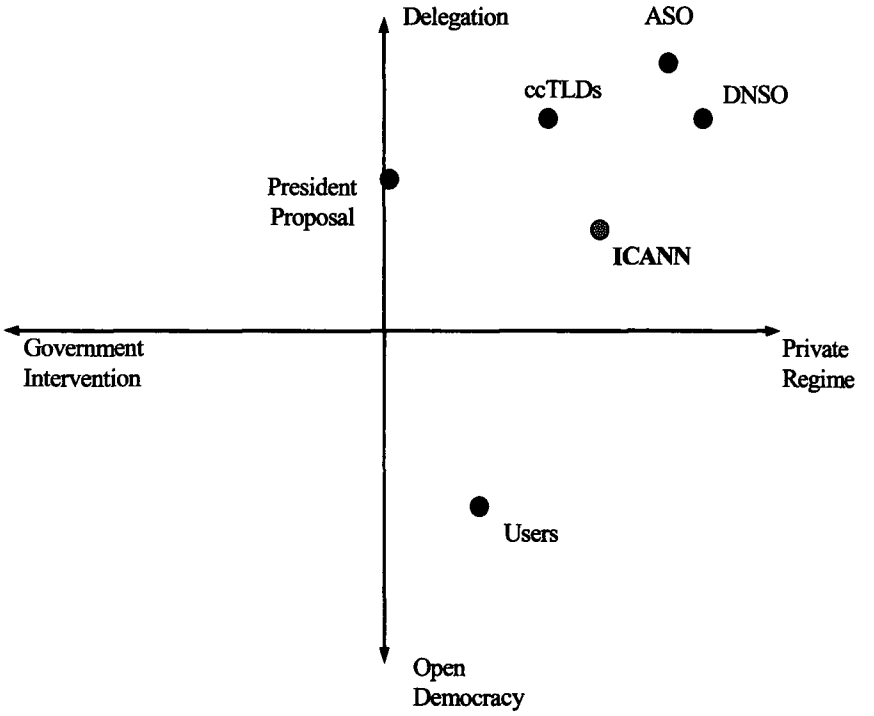
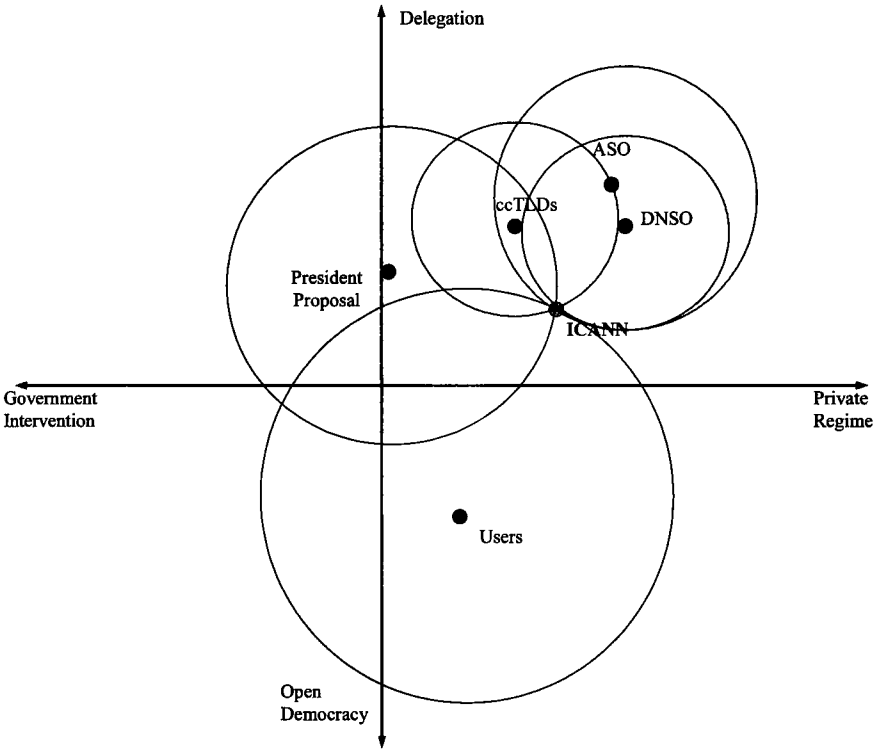


Figure 6. Preferences and Optimal Sets for Reform

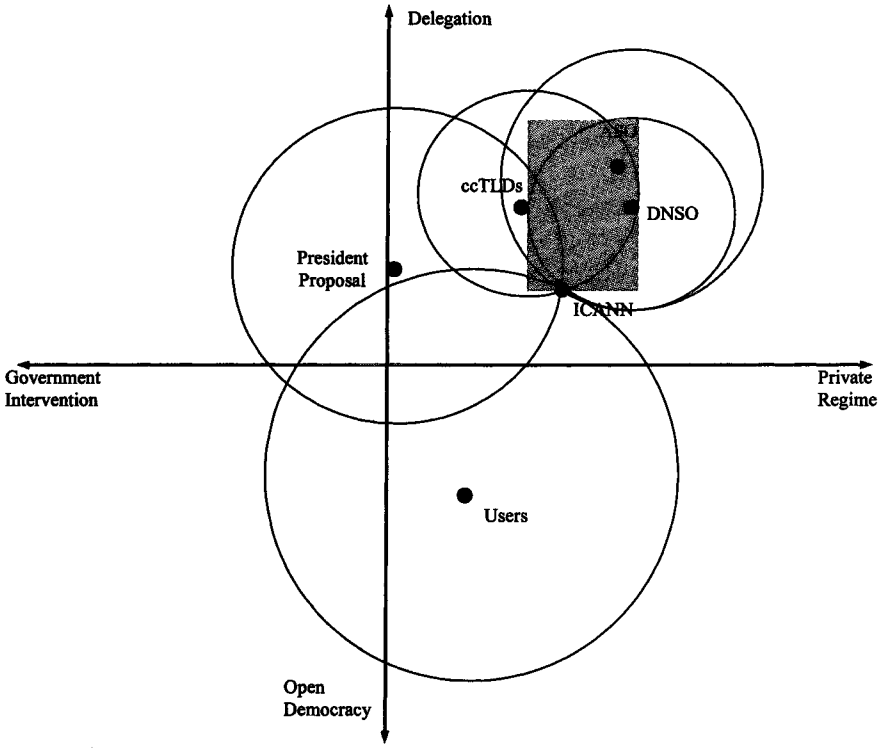


Accordingly, all the points inside the circle are preferred over the status quo, i.e., the current ICANN structure, since the distance from the preferred point to any of the points inside the circle is shorter than the distance to the status quo. For example, in the case of the President, his bliss point represents the most preferred point, but he would accept any reform that is within the circle, given that the distance to its bliss point inside the circle is shorter than the actual ICANN structure. Coalition among different constituencies can happen in those areas where the preferred sets of two or more groups coincide. Furthermore, a given constituency will not accept a reform that lies outside its circle. In such a case, this group would be better off with the current structure of ICANN.

Based on the distribution of preferences, we have made the following inferences in our study. First, the President's proposal is far from politically feasible since it is not part of the preferred set for the majority of the Board. Second, the natural allies in this situation are the DNSO and ASO groups since they prefer similar systems that are totally decentralized from the government and their own delegates on the Board. Third, these constituencies could reach an agreement with ccTLD representatives. As a result, the most probable political coalition that could be formed to successfully change ICANN is that formed by the ccTLD, DNSO, and ASO constituencies.

The shaded area in Figure 7 shows the set of possible changes for the structure of ICANN, in accord with the shared utility of the political coalition described above. Considering this possible set of results, the new structure of ICANN will likely give more policymaking power to the private sector. Furthermore, it will then also reduce the direct participation of users in the formation of the Board.

Figure 7. Optimal Policy Result



B. POLITICAL DEBATE: THE FIGHT FOR REPRESENTATION

In March 2002, right after the President made his reform proposal, the Board of Directors renamed the newly formed Committee of Restructuring (created four months before, in November 2001) the "Committee on ICANN Evolution and Reform" ("ERC").[87] The Committee examined the proposed changes and tried to address the varying concerns of the different constituencies and groups with an interest in how ICANN would function. As a result,

[87] ICANN, Preliminary Report, Mar. 14, 2002, http://www.icann.org/minutes/prelim-report-14mar02.htm.

the Committee provided the main platform upon which each of the constituencies could voice their concerns and preferences.

> In developing these recommendations, the ERC has listened carefully to comments and suggestions of all segments of the ICANN community–both written and verbal statements, most of them public. We have considered and evaluated all of the many constructive suggestions received by the ERC.[88]

Finally, in June 2002, the Committee published its proposal for reform called *A Blueprint for Reform*.[89] In this document, the Committee elaborated on the President's proposal, introduced some changes and requested the Board's approval.[90] The structure of ICANN envisioned in the *Blueprint* is shown in Figure 8.

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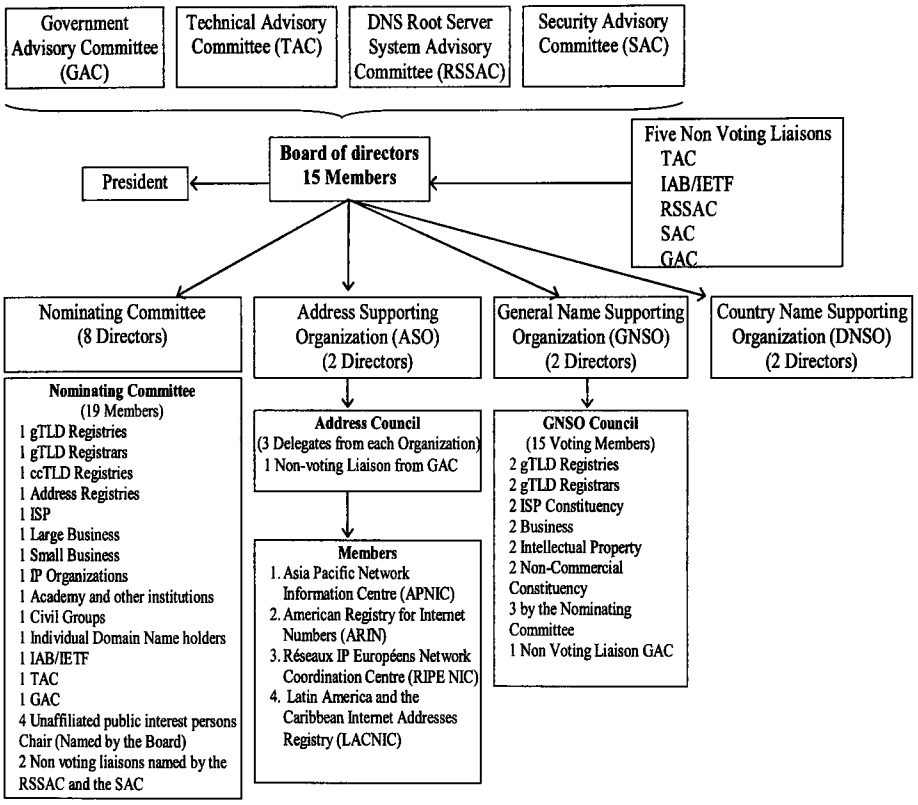
[88] *See* ICANN, ICANN: A Blueprint for Reform, June 20, 2002, http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm.

[89] *Id.*

[90] *Id.*

Figure 8. Blueprint Proposal by the ERC



After extensive debate and bargaining, the ERC ended up with a proposal that differed substantially from the President's.

In the *Blueprint*, the role of the government was reduced, even though it is still more important than under the original governance structure.[91] Government representatives can be found in every organization of ICANN. Nonetheless, the *Blueprint* eliminated some of the more radical reforms proposed by the President. Political pressure from different constituencies and organizations preserved some of the old structure from reform.[92] For example, the ASO and

[91] Committee on ICANN Evolution and Reform, 2002, Government Participation, http://www.icann.org/committees/evol-reform (last visited April 5, 2008).

[92] *See infra* Section VI.C.

the General Name Supporting Organization (GNSO, formerly DNSO) were reinstated in their previous form. Furthermore, the proposal left open the possibility of a new arrangement among the Country Code Top Level Domains, International Governments, and the ICANN Board in order to create a new structure inside ICANN that would better address the interests of ccTLDs.[93]

The creation of a new framework for ccTLDs, with a more active role in ICANN, was a direct result of pressure from the country code managers and from other countries to expand ICANN to the international arena.[94] The Protocol Advisory Organization was eliminated, and its members were transferred to the Technical Advisory Committee. One of the most important proposals involved creating a more ambitious nominating committee, with nineteen members coming from different constituencies and groups. [95] This committee would have the power to name more than half of the members of the Board (Committee on ICANN Evolution and Reform, 2002a).

In summary, the proposal of the ERC seemed to reflect a compromise between the extensive reforms proposed by the ICANN President and the competing interests among the different organizations and constituencies that have a stake in the current structure and policymaking process of ICANN. In the next Sections, we explore the debate between the ERC and the different organizations and groups inside ICANN that led to its present Bylaws.

C. ORGANIZATIONS AND CONSTITUENCIES REACTIONS

Both the proposal introduced by the President of ICANN and the *Blueprint* delivered by the ERC to the Board, received many comments and critiques from the different constituencies and organizations that have an interest in the political process of ICANN. In this Section, we summarize the positions of these groups with respect to the reforms.

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93 ICANN: A Blueprint to reform, *supra* note 88, at "Supporting Organizations."

94 *See infra* Section VI.C.

95 There are 18 voting members, as the President of the board is a non-voting member. *See* ICANN: A Blueprint for Reform, *supra* note 88.

1. THE DEBATE WITH ADDRESS SUPPORTING ORGANIZATION MEMBERS

The ASO members are the Regional Internet Registries ("RIR") who manage addresses in their respective regions.[96] In the proposed reform by the President of ICANN, the role of these RIRs would be strongly limited. First, it would eliminate the ASO, replacing it with a council. Second, it would mix the former ASO members with the Protocol Supporting Organization members. Third, the Nomination Committee would appoint an Internet Engineering Task Force ("IETF") member to the Address Council. The IETF is an international technical community "concerned with the evolution of the Internet architecture and the smooth operation of the Internet." Fourth, the proposed reform would reduce the number of directors that the RIRs could elect. Fifth, the proposal advocated for similar policies for all councils and organizations. Sixth, it created the Technical Advisory Committee in which the RIRs were included. Seventh, it proposed that the Technical Advisory Committee would supervise the Internet Assigned Names Authority ("IANA") policies.[97]

These proposals were strongly rejected by all RIRs, who expressed their disapproval in a submission to the ERC on June 20, 2002.[98] They countered with their own proposal that would put the majority of decision-making power into their hands. Not only would the ASO be preserved, but IANA operational functions, i.e., maintaining the IANA address registry, would be transferred to them. The ASO would also undertake responsibility for the formal adoption of global RIR policies. The role of the ICANN Board, therefore, would be to oversee the ASO's actions, as the ASO would also take over the Board's responsibility of evaluating and approving new RIRs. Given the extent of their control, the RIRs would be willing to have only one director that represents them on the Board.[99] Thus, the RIRs

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[96] *See also* ICANN Address Supporting Organization, http://www.aso.icann.org/ (last visited Apr. 5, 2008) (giving general information about ASO composition, history, tasks and proposals).

[97] *See* LYNN, *supra* note 9.

[98] *See* ICANN, Regional Internet Registry Joint Statement on ICANN Evolution and Reform, http://www.icann.org/committees/evol-reform/second-joint-rir-statement-20jun02.htm (last visited Apr. 5, 2008).

[99] *Id.*

considered a future organization without the involvement of ICANN.[100]

The counterproposal from the RIRs generated an answer from the ERC, which supported some of the changes but strongly opposed others.[101] First, among the accepted changes was the preservation of the ASO in its original form. Second, management of the ASO was left completely to the RIRs without the introduction of an IETF member by the Nominating Committee. Third, the ASO would elect two directors to the ICANN Board. Fourth, the rules and policies for each association would reflect the particular characteristics of its members. Fifth, RIRs are not included in the Technical Advisory Committee nor would this committee supervise IANA policies.

However, the ERC strongly rejected three of the RIRs' requirements. First, address policies would stay in the ICANN Board jurisdiction instead of being transferred to the ASO. Second, the inclusion of new RIRs would be studied and decided by the ICANN Board. Third, the Board's IANA policies would not be transferred to the ASO.[102]

After this exchange of proposals, the RIRs responded in October 2002 with a *Blueprint for Evolution and Reform of Internet Address Management*.[103] In this proposal they persist with some of the ideas rejected by the ERC. As a result, the ERC decided to leave the articles regarding ASO activities open to further amendment as the debate between the RIRs and the ERC continued.[104] This debate concerning the role of each organization in the policymaking of ICANN reflects both the short life of ICANN as a recognized institution for managing the Internet and its quest to maintain balance among the various political demands of its members. Because ICANN is a new corporation, the debates around policymaking and structure will continue for some time.

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[100] *See id.* § 6. General Comment.

[101] *See* ICANN, Update Regarding RIR Submissions, Sept. 16, 2002, http://www.icann.org/committees/evol-reform/update-16sep02.htm.

[102] *Id.*

[103] *See* ICANN, RIR Blueprint for Evolution and Reform of Internet Address Management, http://www.icann.org/committees/evol-reform/joint-rir-blueprint-09oct02.htm (last visited Apr. 5, 2008).

[104] *See* ICANN, Fourth Status Report: Formation of ccNSO Assistance Group, Oct. 12, 2002, http://www.icann.org/committees/evol-reform/status-report-12oct02.htm.

2. THE CREATION OF A NEW SUPPORTING ORGANIZATION: THE CASE OF ccTLDs

One of the changes supported by all constituencies of ICANN was improving the relationship between ICANN and the country code registries. Since the beginning of ICANN operations, ccTLD members perceived that the DNSO was mostly concerned with Generic Top Level Domain ("gTLD") issues and that the relationship between ICANN and ccTLDs should be reinforced.[105] Furthermore, the number of ccTLDs grew at high rates during the 1990s and had an important role in the process of the internationalization of the Internet. As a result, once the reform of ICANN was proposed, the initiative of the ccTLD constituency to be recognized as an independent supporting organization was one of the first issues in the reform agenda of the ERC. The step required to form a separate organization was reaffirmed in the Montevideo meeting in September and the Marina del Rey meeting in November of 2001.[106] Nevertheless, the first proposal of ICANN reform presented by the President in February 2002, fell short of recognizing the ccTLD constituency as an independent group.[107]

The important role of the ccTLD constituency was recognized in the ERC proposal, which created a separate council, but limited its capacity for action by delegating the formation of the council to a steering group comprised mostly of members of the ICANN Board. This council was allowed to name only one trustee.[108] As a result the ccTLD constituency reacted negatively to the President's proposal at the March 2002 meeting in Accra, Ghana.[109] A series of discussions and debates between the ccTLD constituency and the ERC helped to

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[105] *See* ccTLD Constituency of ICANN, World Wide Alliance of Top Level Domain Names, Communiqué from Stockholm Meeting, June 1, 2001, http://www.dnso.org/constituency/cctld/docs/20010601.ccTLDstockholm-communique.html.

[106] *See* ccTLD World Wide Alliance of Top Level Domain-names, Communiqué from Montevideo Meeting, Sept. 2001, http://202.141.141.181/web/communiques/gac10com.htm.

[107] *See* Palfrey, *supra* note 34.

[108] *See* ICANN, *supra* note 88, at § 3; LYNN, *supra* note 9.

[109] *See* ccTLD, World Wide Alliance of Top-level Domain Names, Communiqué from Accra Meeting, Mar. 13, 2002, http://www.wwtld.org/communique/20020313.ccTLDaccra-communique.html.

resolve some of the differences with respect to the final role of the ccTLD constituency in ICANN.[110]

As a result, in September 2002, the ERC created a Country Code Names Supporting Organization ("ccNSO") Assistance Group in order to generate a structure for the ccNSO and to help it reach an agreement regarding the relationship between this new supporting organization and ICANN. Since then, the ccNSO Assistant Group has been working on forming a proposal that permits the ccNSO and ICANN to agree on a common structure and policy.[111] Still, in the new bylaws passed on December 15, the ccNSO was expected to elect two directors to the Board.[112] During continuing discussions for the new supporting organization, the ccNSO Assistant Group produced a set of recommendations for the creation of the ccNSO in February 2003.[113] Based on this report, and on the comments received from ccTLD members, the ERC published a report on the creation and structure of the ccNSO in April 2003.[114] Finally, at the Montreal meetings, the ccNSO was formed based on the recommendations of the Committee.[115] As a result, the new bylaws were amended, leading to the formation of a ccNSO Council, one similar in structure to the other supporting organizations.[116]

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[110] *See* ICANN, Links Concerning ICANN's 2002 Evolution and Reform Process, http://www.icann.org/committees/evol-reform/links.htm (last visited Apr. 5, 2008) (listing all the documents and exchange of ideas with all the organizations and constituencies participating of the reforms).

[111] *See* ICANN, Fourth Status Report: Formation of ccNSO Assistance Group, *supra* note 104.

[112] *See* ICANN, Bylaws, Dec. 15, 2002, http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm.

[113] *See* ICANN, ccNSO Assistance Group: Compiled Recommendations, Feb. 26, 2003, http://www.icann.org/committees/evol-reform/ccnsoag-report-26feb03.htm.

[114] *See* ICANN, ERC's Fifth Supplemental Implementation Report, Apr. 22, 2003, http://www.icann.org/committees/evol-reform/fifth-supplemental-implementation-report-22apr03.htm..

[115] *See* ICANN, ICANN Montreal Meeting Topic: ccNSO Formation, http://www.icann.org/montreal/ccnso-organization-topic.htm (last visited Apr. 5, 2008).

[116] *See* ICANN, Bylaws, Article IX, Feb. 28, 2006, http://www.icann.org/general/bylaws.htm#IX.

As we can see in the debates regarding the role of ASO members and the creation of the ccNSO,[117] the reform process has not been smooth. The bargaining and debate among the committees and the many constituencies has been a long political process.[118] How stakeholders will solve their differences will depend mostly on the political strength of each party inside and outside ICANN. Other constituencies, committees and Supporting Organizations also expressed their ideas and proposals with respect to the reforms.[119]

The exchange of ideas, and the political pressure exerted on the Board to impose certain constituencies' preferences, led to many revisions of the President's original proposal and many revisions of the ERC *Blueprint*. Although defining the relationships between the ICANN Board and the groups that were part of ICANN was still a topic of discussion, the Board of Directors approved the new modified Bylaws in October 2002.[120] After bargaining with ccNSO, the Board approved a new set of Bylaws that included the structure and functions of the new Supporting Organization.[121] The structure of ICANN was finally defined as shown in Figure 9. When comparing this final structure of ICANN with the initial proposal from the President (Figure 8) we find many differences. First, the role of the government was reduced.[122] In the President's proposal, the Government Advisory Committee ("GAC") was supposed to elect five directors (1/3 of the total Board). In the final structure, GAC may not elect even one director.[123] Still, the role of national governments has increased, as GAC now has more direct participation in all groups of ICANN.[124] Nonetheless, many countries left GAC or would not

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[117] *See infra* Fig. 9.

[118] *See* ICANN, Bylaws, *supra* note 116, Art. IX.

[119] See Appendix A for a description of the different points of view with respect to the proposed reform.

[120] *See* ICANN Board Meeting in Shanghai Real Time Captioning, Oct. 31, 2002, http://www.icann.org/shanghai/captioning-31oct02.htm.

[121] *See* ICANN, Bylaws, *supra* note 112.

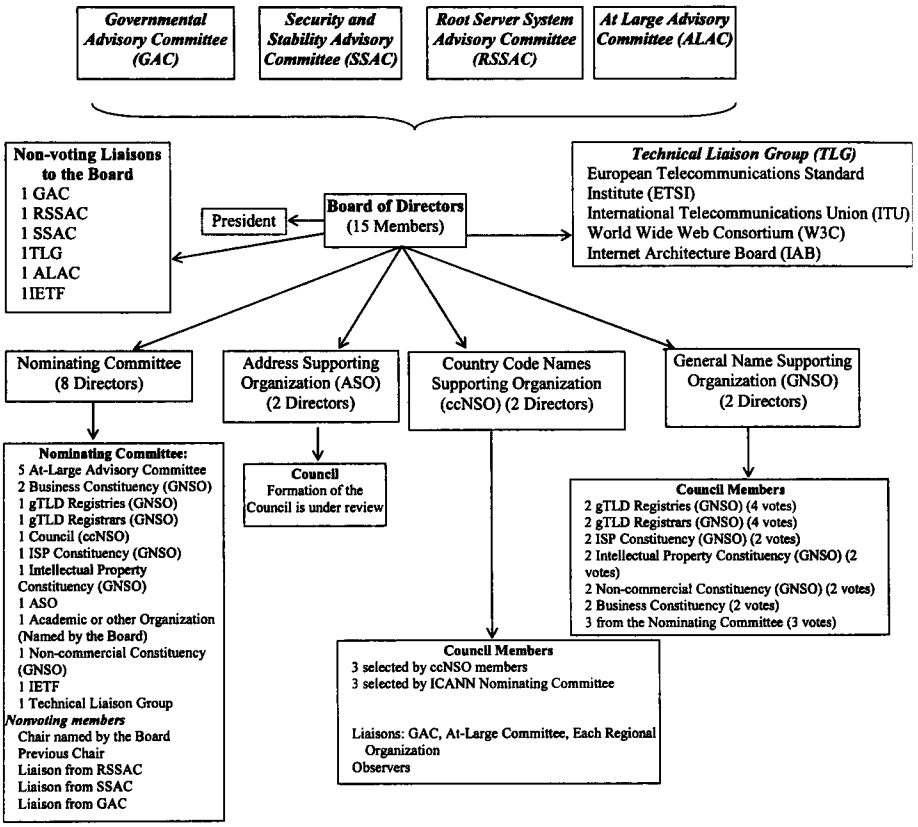
[122] *Compare supra* Fig. 8, *with infra* Fig. 9.

[123] *Id.*

[124] Wolfgang Kleinwachter, *Beyond ICANN vs. ITU? How WSIS Tries to Enter the New Territory of Internet Governance*, 66 GAZETTE: THE INT'L J. FOR COMMS. STUD. 233, 233–51, 2004.

participate in GAC, as they felt that their voices were not heard.[125] This prompted the international community to ask for a change in the governance regime of ICANN.

Figure 9. Structure of ICANN in Accord with the Latest Bylaws



[125] Roman, *supra* note 39, at 6.

On the whole, the reform process entered the realm of politics, and different constituencies struggled to maintain, and enhance, their power. The resulting reform produced several new characteristics. First, the greater presence of GAC members in all ICANN organizations permits a higher degree of communication between the private sector and national governments.[126] As a result, even if ICANN is still a corporation with a strong bottom-up approach to regulating the Internet, there is a movement toward a more cooperative stance with national governments.[127] Second, the role of the ccTLDs was increased by creating a new supporting organization, the ccNSO, to represent them.[128]

This marks an opportunity for international cooperation and a more active role for the international community in ICANN policies. Third, the final reform proved advantageous for ASO and GNSO, both of which avoided being transformed into advisory councils without representation in the Board, because both groups are now protected by electing two directors each, instead of one each.[129] Furthermore, both councils participate in the Nominating Committee and have the chance to influence the election of the other eight directors.[130] Fourth, the Protocol Supporting Organization ("PSO") was eliminated both in the first proposal and in the final bylaws.[131] This means a loss of power for the technical organizations that took part in the political structure of the first ICANN and whose role is reduced to that of advisors to the Board. Fifth, the at-large community lost ground and was left with a newly created At-Large Advisory Committee ("ALAC").[132] Although ALAC can elect five delegates to the Nominating Committee, the Nominating Committee represents many other constituencies besides the at-large members.[133] It seems that through the bargaining process, those organizations and

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[126] ICANN, Bylaws, *supra* note 112.

[127] *See* Kesan & Gallo, *supra* note 4, at 1497.

[128] *See* ICANN, Bylaws, *supra* note 116.

[129] *See id.* Arts. VIII, X.

[130] *Id.*

[131] *See* ICANN, Bylaws, *supra* note 112.

[132] *Id.*

[133] *See id.* Art. XI, §§ 2, 4.

constituencies, which were better represented and structured than the at-large community, undermined the initial powers given to at-large members in the first reform proposal.[134]

As we can see, the reform of ICANN is an example of a political process operating to reach a consensus and maintain equilibrium of power within an organization. From this analysis, we conclude that ICANN is not only a technical organization concerned with the technical management of Internet addresses and numbers, but also a political organization with the power to create policies for the functioning of the Internet domain name system. Furthermore, ICANN is now definitively a political body with different constituencies holding a stake in its policies. In the next Section, we analyze the result of this political struggle for reform.

D. WINNERS AND LOSERS: THE DISTRIBUTION OF POWER AFTER REFORM

As in any reform, some groups are better positioned than others to profit from the changes. The political bargaining described in the previous Section demonstrates the political characteristics of ICANN. We can identify the winners and losers by comparing the previous structure of ICANN with the final reform. In Table 1, we calculate the influence of each group and constituency over the Board of Directors as the share of influence they have on the composition of the Board.[135] We recognized the percentage of the number of seats in the Board elected by each group or constituency as a proxy for the power of this group inside ICANN. This percentage indicates the relative power of each group as compared with the others. As we can see, the winners from the reform have been the GNSO and ccTLD constituencies. Even though now the GNSO constituencies elect only two directors by themselves, as compared with three directors previously, they have a greater influence on the Nominating Committee, which elects eight more directors.

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[134] *See* Palfrey, *supra* note 34.

[135] *See infra* Appendix (explaining the methodology employed in the creation of this table).

Table 1. Relative Political Strength of Different ICANN Constituents (As Probability of Electing a Director to the Board)

	Before Reform	After Reform	% Change
Director	**5.26**	**6.67**	**26.7**
GNSO (ex DNSO)(*)	**15.79**	**33.19**	**145.2**
Business	2.26	7.68	240.4
Non-Commercial	2.26	4.54	101.3
gTLD Registries	2.26	5.94	163.5
Registrars	2.26	5.94	163.5
ISPs	2.26	4.54	101.3
Intellectual Property	2.26	4.54	101.3
ASO	**15.79**	**16.47**	**4.3**
ARIN	3.95	4.12	4.3
RIPE NCC	3.95	4.12	4.3
APNIC	3.95	4.12	4.3
LACNIC	3.95	4.12	4.3
CCNSO (ex ccTLD)	2.26	**16.47**	**630.2**
Nominating Committee	**0**	**55.44**	
Elected At-Large Members(**)	**26.32**	**15.69**	**-40.4**
At-Large Constituencies	**26.32**	**10.5**	**-60.3**
Africa	5.26	2.09	-60.3
Latin America	5.26	2.09	-60.3
North America	5.26	2.09	-60.3
Asia/Aust/Pac	5.26	2.09	-60.3
Europe	5.26	2.09	-60.3
Non Elected (Initial Board)	***21.1***	***0***	-100.0
Academic and others	0	3.14	
PSO (***)	**15.79**	**5.49**	-65.2
IETF	3.95	3.14	-20.5
W3C	3.95	0.78	-80.1
ITU-T	3.95	0.78	-80.1
ETSI	3.95	0.78	-80.1
IAB		0.78	
Total	100.00	100.00 (****)	

Source: Own elaboration based on ICANN bylaws.

Notes: (*) Includes the index value corresponding to the ccTLD Constituency.

(**) In the old bylaws the At-Large Advisory Committee did not exist, but we related it to the Directors elected by the broad constituencies in each region. Under the new bylaws the elected at-large members come from the At-Large Advisory Committee members representing each RALO and the members elected by the Nominating Committee to the ALAC.

(***) PSO was eliminated in the new bylaws. We are relating this index to the influence the members of the new Technical Liaison Group ("TLG") have in naming Board Directors through the Nominating Committee.

(****) This total can be obtained by two procedures: first, by summing up all the subtotals for each group (not in bold numbers) plus the subtotal for ccNSO. Second, by summing up the subtotals for the Director, ASO, GNSO, CCNSO, Elected At-Large Member, Academic and Others, PSO, IAB and the influence of the Nominating Committee in the GNSO (*see* Apendix B).

Inside the GNSO, our calculations demonstrate that the reform favored private businesses, which compose the only constituency sending two delegates to the Nominating Committee (one representative of small businesses and the other of large businesses). The reform favors constituencies of the gTLD registries and registrars, who receive more voting power inside the GNSO Council. Finally, Internet Service Providers ("ISP"), Intellectual Property, and Non-Commercial Constituencies improved their situation but to a lesser extent than those entities previously mentioned. The reform primarily favors the ccTLD constituency, whose influence inside ICANN has improved substantially.

The groups that lost the most power and influence in ICANN are the at-large constituencies, elected by Internet users, and the technical organizations, members of the former Protocol Supporting Organization ("PSO"). Previously, at-large members could elect at least five directors through democratic elections among Internet users. Now they are represented by only five of the seventeen representatives on the Nominating Committee. Furthermore, these five representatives are elected by ALAC, in which the Regional At-Large Organizations ("RALO") can elect just two representatives each. The Nominating Committee elects the other five members of ALAC. As a result, the direct participation of Internet users in the election of ICANN Directors has been diluted through a series of mechanisms and committees.

PSO members were downgraded to serve an advisory role in ICANN. The creation of the Technical Liaison Group ("TLG"), without any formal structure and with the aim of giving advice to the Board on specific issues, determined the fate of PSO members in the ICANN government. The only direct influence these members have is through a delegate from the TLG on the Nominating Committee. The only

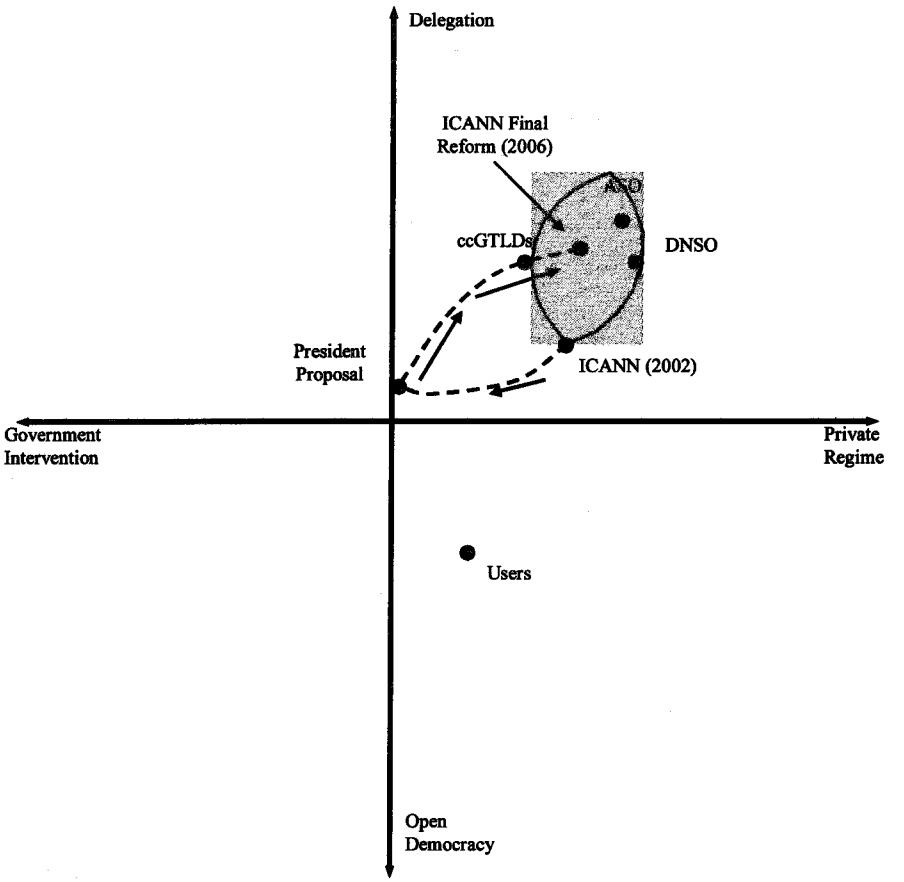
organization that could maintain some influence was the IETF, which has a representative on the Nominating Committee, though it is not in the TLG. Finally, the ASO slightly increased its power inside ICANN, but overall experienced little change.

If we look at the influence of national governments in ICANN, there is a greater role for the Government Advisory Committee. However, this committee does not have any direct participation in the policymaking process because national governments elect no members of the Board. This result is far from the ambitious changes initially proposed by the President. Consequently, the winners and losers of this process are well described by our political model of preferences, since the initial proposal by the President was steered toward a regime closer to the preferences of ICANN's original constituencies.

The reform proposed in early 2002 was far from ideal for the main ICANN constituencies. As a result, the political influence of each of these constituencies gave shape to the final reforms of ICANN. In the end, most of the President's changes were overturned; instead, reforms were instituted that favored the stakeholders with political power in the decision-making process (Figure 10). The final result has been detrimental to the direct participation of Internet users and the technical organizations.

We can expect more direct policymaking, without a lesser dispersion of power. We can also expect more political decisions because the private sector with political interests in the Internet now has a more important role, and national governments are also taking a more active stance. Finally, as ICANN becomes more international, we should expect better enforcement of its policies throughout the Internet, especially from ccTLDs with greater Board power. Nonetheless, we should not expect this structure to be stable, as ICANN is an organization still in its formative stage. As the new groups with more power begin to shape ICANN policies, new constituencies will form and challenge the status quo. It is therefore important to recognize the political nature of ICANN, as recent reforms may anticipate how ICANN will develop.

Figure 10. Evolution of the Reform



VI. OUTSIDE-IN REFORM: INTERNATIONAL COMMUNITY PROPOSALS

The reform process failed to bring a more active role for national governments that the President of ICANN sought, and in the end reinforced the power of the groups already represented on the Board. This result represented a major success for the private sector in controlling ICANN, but also generated an outcry from the international community, which was already opposed to the existing structure of ICANN. In the end, the attempt by ICANN's President to seamlessly bring the international community together failed.

The opposition to ICANN can be traced to its inception and the monopolization of the U.S.'s control of the contract with ICANN. This initial opposition was one of the main factors that produced the attempt at reform in 2002. As previously explained, ICANN's President attempted to bring foreign governments into the decision making process as an instrument to silence criticism. However, after the reversal of the President's reform, the international community reassessed its attacks on ICANN due to frustration resulting from the reform process. Since the inception of ICANN in 1997, most countries have envisioned the Internet as an international phenomenon that transcends the frontiers of a country. A group of countries wanted to transfer Internet governance to a United Nations intergovernmental body, the International Telecommunication Union.[136]

In this respect, the reform attempt by ICANN's President can be seen as an attempt to bridge this gap. However, the final reform did not satisfy developing countries[137] and it generated a withdrawal of support for ICANN's Government Advisory Committee ("GAC") from many countries as well as the ITU. The United Nations, through the ITU, created a series of summits in 2003 called the World Summit on the Information Society. Because Internet governance was an issue of increasing importance, the United Nations created the Working Group on Internet Governance[138] with the specific purpose of analyzing the appropriate form for Internet Governance.[139] The forty members of WGIG[140] held several meetings since 2003 in preparation for the second phase of WSIS which occurred in Tunis in November 2005. The approach of WGIG with respect to Internet governance, specifically ICANN, is based on a top-down approach in which national governments are in charge of the regulatory system.[141] This

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[136] *See* Kleinwachter, *supra* note 124, at 230–241.

[137] LYNN, *supra* note 9; ICANN, Links Concerning ICANN's 2002 Evolution and Reform Process, *supra* note 10.

[138] Don MacLean, *A Brief Story of WGIG, in* REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 10 (William J. Drake ed., 2005), *available at* http://www.wgig.org/docs/book/WGIG_book.pdf.

[139] WGIG, Report of the Working Group on Internet Governance, 3, http://www.wgig.org/docs/WGIGREPORT.pdf (last visited Apr. 5, 2008).

[140] MacLean, *supra* note 138, at 11.

[141] Markus Kummer, *Introduction, in* REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 1 (William J. Drake ed., 2005).

approach is in striking contrast to the regulatory model ICANN, supported by the United States government, has been implementing.[142]

In preparation for the 2005 WSIS, the WGIG held four meetings in 2004 and 2005.[143] In the last meeting, the Working Group produced a report delineating an approach for Internet governance, specifically with respect to ICANN.[144] The WGIG defined Internet governance as "the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet."[145]

This vision of Internet governance, with national governments as the main source of rules and regulations, contrasts with the ongoing definition by ICANN stakeholders and the United States government of a bottom-up, private-sector led regulatory regime.[146] The preeminence of a top-down approach is apparent when the WGIG outlines the role of national governments with respect to Internet Governance:

- Public policymaking and coordination and implementation, as appropriate, at the national level, and policy development and coordination at the regional and international levels;
- Creating an enabling environment for information and communication technology ("ICT") development;
- Oversight functions;
- Development and adoption of laws, regulations and standards;

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[142] MUELLER, RULING THE ROOT, *supra* note 6.

[143] The four meetings of the WGIG were held in Geneva on: November 23–25, 2004; February 14–18, 2005; April 18–20, 2005; and June 14–17, 2005. *See* World Summit on the Information Society, www.wsis.org (last visited Apr. 5, 2008).

[144] *See* WGIG, Report of the Working Group on Internet Governance, *supra* note 139.

[145] *Id.*

[146] Kummer, *supra* note 141, at 2.

- Treaty-making;
- Development of best practices;
- Fostering capacity-building in and through ICTs;
- Promoting research and development of technologies and standards;
- Promoting access to ICT services;
- Combating cybercrime;
- Fostering international and regional cooperation;
- Promoting the development of infrastructure and ICT applications;
- Addressing general development issues;
- Promoting multilingualism and cultural diversity; and
- Dispute resolution and arbitration.[147]

As we can see, the extent of government's role in Internet governance under this vision is much enhanced when compared to that provided by the GAC of ICANN. In the case of names and numbers, the role of national governments was to provide advice and oversight of ICANN's Board decisions, while under the WGIG report, national governments are in charge of the governance system.

In accord with this definition of Internet governance and the government's role in it, the WGIG proposed the creation of an organizational form for the governance of the Internet, under the following general principles:

- No single government should have a pre-eminent role in relation to the international Internet governance;

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[147] WGIG, Report of the Working Group on Internet Governance, *supra* note 139, at 8–9.

- The organizational form for the governance function will be multilateral, transparent and democratic, with the full involvement of Governments, the private sector, civil society and international organizations; and

- The organizational form for the governance function will involve all the stakeholders and relevant intergovernmental and international organizations within their respective roles.[148]

In the case of names and numbers, these principles imply the end of United States control of ICANN and the transfer of these activities to a multilateral organization, modeled closely after the United Nations. This indeed implies a purer top-down regulatory regime as opposed to the bottom-up approach of ICANN.

Furthermore, the WGIG proposed four different models for such organization. These models included, in some form or another, the tasks currently performed by ICANN. An analysis of these models provides useful insights into the international debate regarding Internet governance and the alternative models to ICANN.

The first model proposed the creation of a Global Internet Council ("GIC") with members from the national governments of each region.[149] The main objective of the GIC was to overtake the function of the U.S. Department of Commerce with respect to ICANN (Figure 11).[150]

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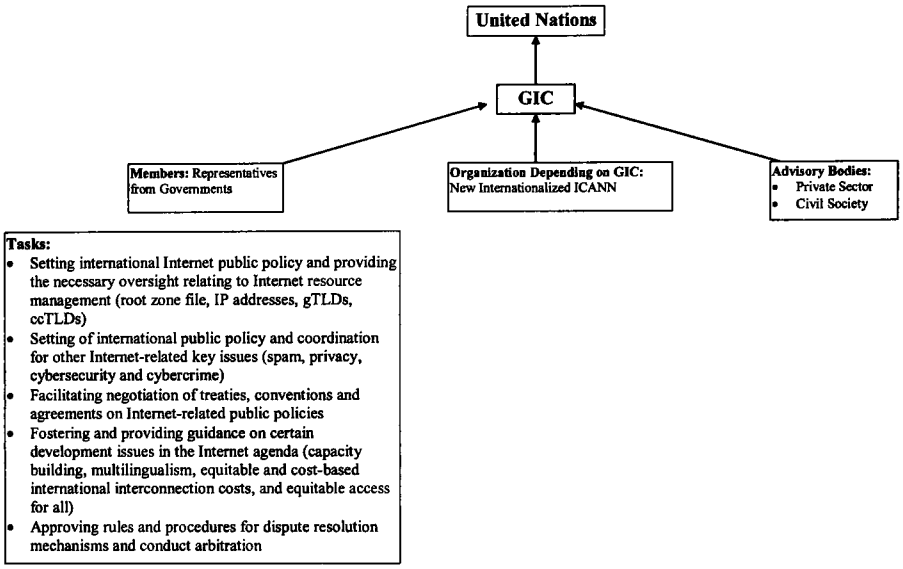
[148] *Id.* at 12.

[149] *See* Abdullah A. Al-Darrab, *The Need for International Internet Governance Oversight, in* REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 178 (William J. Drake ed., 2005), *available at* http://www.wgig.org/docs/book/WGIG_book.pdf (explaining that Model 1 was the one that many in the WGIG believed to be the most appropriate for Internet governance).

[150] *Id.* at 181–82.

Figure 11. Proposal Creation of Global Internet Council



The GIC will accomplish most of the tasks regarding Internet governance and ICANN will depend on the GIC, as it now depends on the United States government. In this regime, the private sector and civil society will be relegated to an advisory role without any power in the decision-making process.[151] Finally, the GIC would depend on the United Nations.[152] As a result, this model represents a strong departure from the current system to a top-down regime controlled by a multinational body.

The second model proposed a significantly minor reform of ICANN. According to this proposal, there is no need for a specific organization, but the current regime could continue operating under the same rules. However, it proposes to change the Government Advisory Committee of ICANN in order to take into account the preferences of all countries.[153] In this new forum, national governments could participate, debate different policy proposals, and recommend specific courses of action. However, this new forum

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[151] *Id.* at 180.

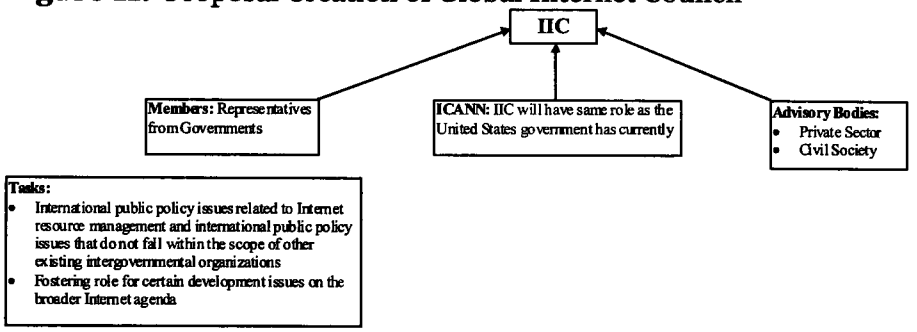
[152] *Id.* at 182.

[153] WGIG, Report of the Working Group on Internet Governance, *supra* note 138, at 14.

would not have any power to implement these policies. This proposal seems minor compared to the previous one, and it resembles the proposal made by ICANN's President in 2002.[154]

The third model proposes a departure from the current system in line with the first model (Figure 12). This model proposes the creation of an International Internet Council (IIC), which would assume the current role of the United States in the governance of ICANN. The IIC would replace ICANN's GAC with the private sector and civil society as advisory bodies.

Figure 11. Proposal Creation of Global Internet Council



Finally, the fourth model also proposes a departure from the current system, but envisions the creation of three different organizations to handle three main governance issues:

- Public policy development and decision-making on international Internet-related public policy issues led by Governments;
- Oversight over the body responsible at the global level for the technical and operational functioning of the Internet led by the private sector; and
- Global coordination of the development of the Internet through dialogue between Governments, the private sector and civil society on an equal footing.[155]

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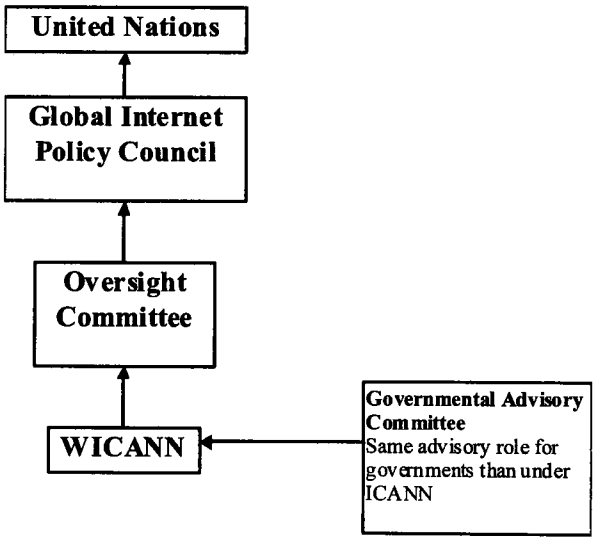
[154] *See supra* Section III.

[155] WGIG, Report of the Working Group on Internet Governance, *supra* note 138, at 15.

The first organization proposed is the Global Internet Policy Council ("GIPC"), which would be led by the government with the private sector and the civil society participating as advisors. The second organization is the World Internet Corporation for Assigned Names and Numbers ("WICANN"), which is similar to the current ICANN but led by the international private sector and linked to the United Nations (Figure 13).

Figure 13. Proposal Creation of WICANN



In this case, the Oversight Committee, appointed and controlled by the Global Internet Council ("GIC"), will have the same role the United States government currently has with respect to ICANN. This new organization will be linked to the United Nations. National governments will also have an advisory role through GAC, as they do under the current ICANN. Finally, civil society will participate through an advisory role.

The third organization is the Global Internet Governance Forum ("GIGF") which will be a forum for national governments, the private sector and civil society to facilitate the coordination and debate of public policy issues.[156]

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[156] *Id.* at 16.

These models for Internet governance signify a strong departure from the bottom-up regime of ICANN and a transfer of control from the United States to the United Nations or another international organization. These proposals were considered in the 2005 WSIS. The United States and ICANN rejected this sweeping reform,[157] while most developing countries and even the European Union supported some departure from the current regime.[158] In the end, the United States' position prevailed and ICANN was saved. However, the WSIS approved the creation of an Internet Governance Forum ("IGF"), which should evaluate future policies and governance regimes for the Internet.[159] The IGF is given a wide spectrum of policy issues to consider,[160] but its role is limited to an advising organization. The document clearly specifies that the IGF is not intended to have any "oversight function and would not replace existing arrangements, mechanisms, institutions and organizations, but would involve them and take advantage of their expertise. It would be classified as a neutral, non-duplicative and non-binding process. It would have no involvement in day-to-day or technical operations of the Internet."[161] This clause seems to protect ICANN from being replaced by an international institution, but it also leaves the possibility that the IGF can recommend to replace ICANN in the future.[162]

As a result, the future of ICANN looks uncertain, not just because of the internal struggle for power, but also because of the opening of Internet governance to the international arena, where national governments have a stronger say than the private sector. Furthermore, we have two incommensurable approaches to Internet governance. On one hand, we have a hands-off approach promoted by the United States through its contract with ICANN.[163] This approach

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[157] Kleinwachter, *supra* note 124, at 223.

[158] *See* ICANN COMMENTS ON THE REPORT OF THE WORKING GROUP ON INTERNET GOVERNANCE (2005), http://www.icann.org/announcements/ICANN-WGIG-report-comments-15aug05.pdf.

[159] *See* WSIS, Tunis Agenda for the Information Society, World Summit on the Information Society, Nov. 18, 2005, at 11, http://www.itu.int/wsis/ docs2/tunis/off/6rev1.pdf.

[160] *Id.* at 11.

[161] *Id.* at 12.

[162] *Id.* at 10.

[163] *See supra* notes 151–65 and accompanying text.

pushes for a continuation of the current regime, which in turn gives the United States a monopoly over the control and oversight of ICANN. The European Union supports this hands-off approach, but prefers the United States to step down as the government in charge of ICANN activities.[164]

On the other hand, the top-down approach of the WGIG, promoted by developing countries, implies a multilateral approach with direct control of Internet governance by the government.[165] Note that this preferred point represents the sentiment of the majority of the members of WGIG and country participants of WSIS, because some countries, like the United States, prefer to continue the decentralized system.[166] Figure 14 shows where the proposed reform by the international community ranks with respect to the changes introduced by ICANN. As we demonstrate, the initial proposal by the President tried to engage government in a greater degree in ICANN's decision-making process, but failed. In the end, the reform process gave way to a system with a higher degree of participation from ICANN stakeholders and with more participation from national governments, albeit at an advisory level. However, the WGIG does propose a dramatic change to Internet governance by giving national governments a much bigger role.

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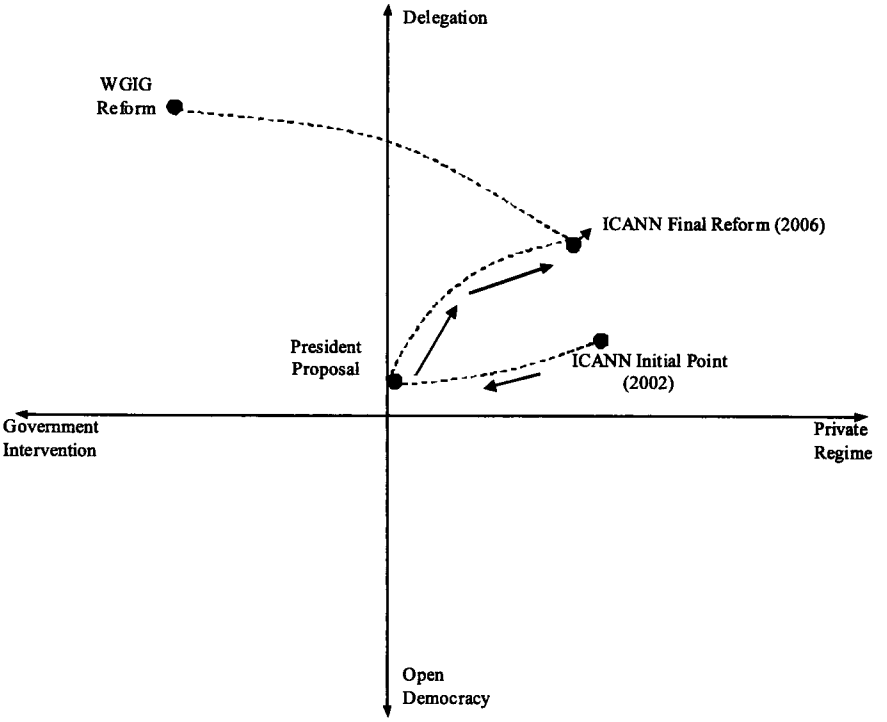
[164] Viviane Reding, *ICANN? We All Can*, WALL ST. J., Nov.16, 2005, at A18.

[165] John Miller & Christopher Rhoads, *U.S. Fights to Get Control of Global Internet Oversight*, WALL ST. J., Nov. 16, 2005, at B2.

[166] Kleinwachter, *supra* note 124, at 221.

Figure 14. Proposed ICANN Reform



As for voting under a democratic versus a delegate system, there is evidence, as shown throughout the article, that direct democracy by Internet users has lost any chance of survival. Furthermore, under the WGIG proposal, the system would move toward a stronger delegation system, internally democratic, in the sense that more countries will have more influence on regulatory issues, but externally undemocratic due to the nature of representative selection for each sector; this is even more important in the case of the WGIG regime. As a result, we have a classical confrontation between a top-down approach and a bottom-up approach for governing the Internet. As previously analyzed, these different positions were clearly discussed during the WSIS meeting in Tunis, where the international community decided to maintain ICANN and the current system under the control of the United States. However, this decision is not definitive, and the newly created Internet Governance Forum could shift the system to a more top-down regime in the future. As a result, an unstable situation still exists; the international community is trying to propose an alternative to ICANN, which currently maintains the

control of the Domain Name System with the support of the United States.

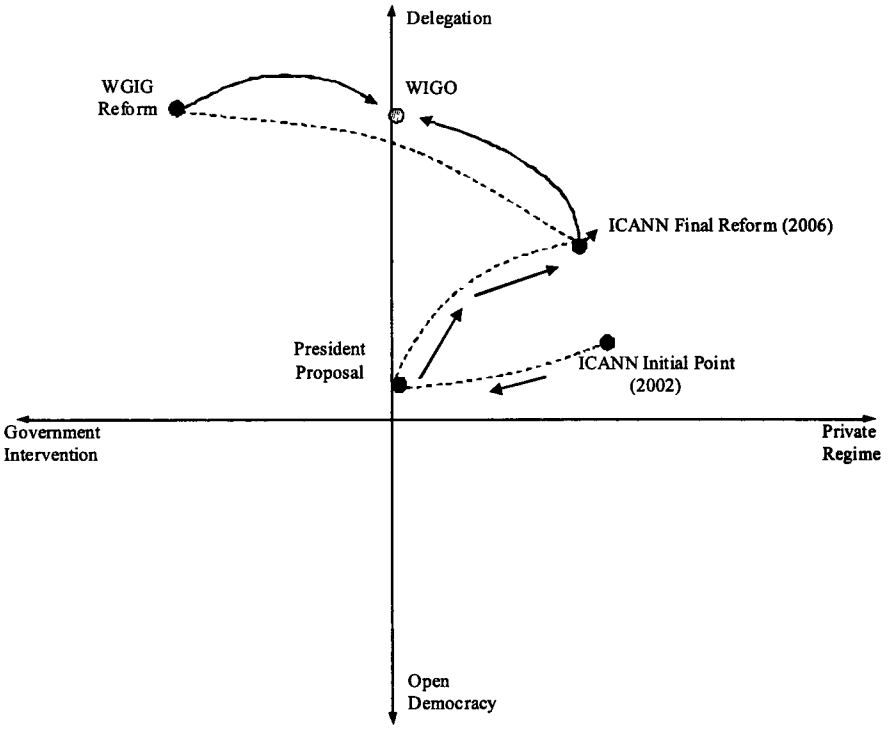
A. THE WORLD INTERNET GOVERNANCE ORGANIZATION

Given the tension between ICANN and the United Nations, we suspect that this transition could be moved forward by the creation of a supranational entity in charge, not only of ICANN's existing responsibilities, but also of other areas related to the Internet, i.e., e-commerce, Internet security. We call this organization the World Internet Governance Organization ("WIGO"); it would be managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail the creation of an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the United Nations. In order to succeed in such an enterprise, WIGO should follow the example of other international organizations, like the World Trade Organization ("WTO"), and build Internet governance around well-defined technical and regulatory rules that foster the economic and social development of this space. In this case, instead of trying to build an organization based on the consensus of all countries with a stake on the system, developed countries should rely on the technical advice of organizations, public and private, with a stake in the Internet. Based on these general guidelines, countries would be offered incentives to participate in this system, for example, through economic gains or the availability of a seal of quality. In exchange, countries would adhere to the international norms regulating the Internet and provide secure access to their respective domain names.

Figure 15 shows how an organization like WIGO will fit among the established preferences of the involved actors. In this respect, WIGO could strike a compromise between the U.S., which will not debate the power of governance without clear rules, and the UN. WIGO would allow both parties to obtain some of their objectives. The U.S. would retain some power to design the system, while other developed and developing countries would have more say in the direction of the system. A well-thought proposal that considers the foremost needs of the Internet will have a greater chance of succeeding than individual attempts to overtake over the governance of the Internet. Furthermore, WIGO will generate a point of convergence for the diverse preferences of international stakeholders such as national governments, the private sector and consumers. Nonetheless, the success of such a proposal requires countries to realize that

unorganized or individual attempts to regulate the Internet will not carry the day.

Figure 15. Proposed ICANN Reform and WIGO



VII. CONCLUSIONS

The United States created ICANN to promote international cooperation with regard to Internet governance, based on a bottom-up system in which government intervention was limited, if not eliminated. However, as the Internet has become a global phenomenon, this initiative has faced increasing opposition from the international community. Despite the initial arguments to the contrary posed by the U.S. government and ICANN's creators, the evolution of ICANN, a process wherein all groups and constituencies try to impose their preferences, reveals its political nature. During the reform movement initiated internally in ICANN, different

constituencies tried to exploit the situation by gaining power positions in the new structure. The political strength of different groups and constituencies reversed some of the initial reforms and produced a totally new structure. The international community challenged ICANN's internal reform attempt because the results of this reform did not satisfy its preferences. The International community concentrated its efforts on changing the primary structure of ICANN from a private regulatory entity into a multilateral organization controlled by international governments and removing the direct control of ICANN from the United States government. In the end, even though the proposals seem to look for different structures to regulate domain names and numbers on the Internet, they represent a political struggle between opposing points of view.

Among the results of our analysis, we can highlight the following: first, as a result of the reform process, the private sector consolidated its political position in the ICANN structure, at least in the short-run. With the new bylaws, the private sector retained some of the power it had before, and even gained more power. Among the winners of the reforms are: the GNSO constituencies, which gained important power spaces in the new design; ASO members, which had some gains, but more importantly are still debating their future with the potential for a more expansive relationship with ICANN; and the ccNSO, which was recognized as an independent supporting organization. However, the inside-out attempt to reform proved to be weak because it failed to bring outside constituencies into the governance body and provided additional fuel the already strong opposition from the international community.

First, the inside-out reform analysis allowed us to examine the political strength of ICANN's different constituencies. This process also showed the important role of ICANN as a political instrument rather than technical corporation. An indication of this is the fact that most of the debate on the reform was based on how to divide the power inside ICANN, more specifically inside the Board of Directors, and how to maximize the capacity of each group to enforce their policies.

Second, our analysis shows how the inside-out reforms sought to enhance international cooperation. Creating a supporting organization for the ccNSO and the incentives for international governments to participate in a better CGA opened the ICANN's gates to more extensive international participation in policymaking. However, these attempts were not enough to satisfy the international community; it did not respond to the reform with approval and instead tried to generate its own model for Internet domain names governance.

The response of the international community to the regulatory regime of ICANN was the creation of a new organization with international ties controlled by national governments. This proposal, as summarized in the WGIG report, sought to overhaul ICANN and take away the United States' direct control of ICANN and the management of names and numbers on the Internet. As a result, we face a struggle between two different types of regulation–a bottom-up approach with more participation from the private sector, and a top-down approach that intends to take Internet governance into the international arena.

Internet governance has become a hot political issue, and the organizations in charge of managing the regulatory regime will reflect these political preferences. The effectiveness of any of these governance regimes will depend on how well the specific structure of power provides an opportunity for consensus. In the end, the reform and political struggle surrounding it have unmasked the political nature of ICANN. As a result, ICANN's future will depend on the consensus of its constituents and on the struggle between public and private sectors. In this debate, the United States government is one of the only governments defending ICANN in its current state because of the contract that ties ICANN directly to the U.S. Department of Commerce. In response, the international community is pushing the U.S. to hand over its sole control of ICANN.

In light of the tension between both parties, we believe that ICANN governance could move forward through the creation of a supranational entity in charge of not just ICANN's responsibilities, but also of other areas related to the Internet, i.e., Internet security. We call this organization the World Internet Governance Organization. WIGO would be managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the United Nations.

APPENDIX

The methodology for the construction of the Index for Distribution of Power is as follows:

First, we measured the influence of each constituency according to the old structure of ICANN (beginning of 2002). This influence is represented by the percentage of seats on the Board that each constituency elects. For example, the DNSO elected 3 Directors to a Board of 19 Seats. Accordingly, the relative power of the DNSO is calculated as 3/19=15.8. The DNSO is formed by 7 different constituencies. Each constituency has a vote. For the Business constituency, the power of electing a Board member is 15.8/7=2.26. All the other values were calculated accordingly.

Table A1: ICANN Political Distribution of Power (Old Bylaws)

Constituency	*Directors*	*Weight in the Board of Directors*	*Political Strength particular groups*
At-Large Directors	**9**	47.4	
Not Elected	***4***	21.1	
Elected	***5***	26.3	
Africa	1		5.26
North America	1		5.26
Europe	1		5.26
Latin America and Caribbean	1		5.26
Asian/Australia/ Pacific Region	1		5.26
DNSO	**3**	15.8	
Business			2.26
Non Commercial			2.26
ccTLD Registries			2.26
gTLD Registries			2.26
Registrars			2.26
ISPs			2.26
Intellectual Property			2.26
ASO	**3**	15.8	
ARIN			3.95
RIPE NCC			3.95
APNIC			3.95
LACNIC			3.95
PSO	**3**	15.8	
IETF			3.95
W3C			3.95
ITU-T			3.95
ETSI			3.95
Director	**1**	5.2	5.2
Total	**19**	**100.0**	**100.0**

Second, we measured the same index after the reform. Accordingly, those groups that are favored by the reform would have more direct decision-making in the naming of Board members. It is important to mention that we considered the representation of each constituency in the Nominating Committee multiplied by the percentage of directors the Nominating Committee elects as further evidence of each constituency's direct influence on the Board of Directors. The methodology of calculating the percentages, or political strength, is the same as in Table A1.

Table A2: New Regime

	Directors	Weight in Board of Directors	Political Strength Particular Groups
GNSO	**2**	**13.33**	
Business			1.4
Non Commercial			1.4
gTLD Registries			2.81
Registrars			2.81
ISPs			1.4
Intellectual Property			1.4
ICANN Nominating Committee			2.1
ASO	**2**	**13.33**	
ARIN			3.32 5
RIPE NCC			3.32 5
APNIC			3.32 5
LACNIC			3.32 5
CCNSO	**2**	**13.33**	
Director	**1**	**6.7**	
Nominating Committee	**8**	**53.3**	
At-Large Advisory Committee			15.7
Africa			2.1
Latin America			2.1
North America			2.1
Asia/Aust/ Pac			2.1
Europe			2.1
Nom Committee			5.2
Business GNSO			6.3

Table A2: New Regime (continued)

	Directors	Weight in Board of Directors	Political Strength Particular Groups
gLTD			
Registry			
GNSO			3.1
Registrars			
GNSO			3.1
CCNSO			3.1
ISP GNSO			3.1
IP GNSO			3.1
ASO			3.1
ARIN			0.7
RIPE NCC			0.7
APNIC			0.7
LACNIC			0.7
Academic			
and others			3.1
Non			
Commercial			
GNSO			3.1
IETF			3.1
ICANN TLG			3.1
W3C			0.7
ITU-T			0.7
ETSI			0.7
IAB			0.7
Total	**15**	**100.0**	**100.0**